

respondence with the house about the sale of stockings and reported my several visits to the house that I made request for information.

X Q. 92. You were in correspondence with your employer about the sale of what socks, the Notaseme or Irontex?

A. The Notaseme, and the use of the label.

X Q. 93. And after making that report you slipped the matter from your memory?

A. No. It gradually went in the matter of details.

X Q. 94. Will you please state, in a general way, what happened at Macy's with reference to your request for Notaseme socks?

A. In a general way, any time I asked for Notaseme socks some socks were put up.

X Q. 95. Mr. Keefe, can you please be more specific than that, what socks were put up in the place of Notaseme socks?

A. I could not say as to that and I could not be explicit.

X Q. 96. Is there any sock or hosiery that was offered to you in place of Notaseme hosiery when asked for by you?

A. None that I have now.

X Q. 97. You mean that you did not buy any?

A. I bought stockings there.

X Q. 97. Will you please state distinctly whether any stockings that you bought there at Macy's in the years 1908, 1909, 1910, or at any other time whatsoever were sold to you as Notaseme socks?

A. Yes.

X Q. 98. Where is that sock?

117 A. I don't know.

X Q. 99. What sock was it?

A. I do not know.

X Q. 100. Whose manufacture was it?

A. I do not know.

X Q. 101. Whose label was on it?

A. I do not know.

X Q. 102. When was it bought?

A. I do not know.

X Q. 103. In what year was it bought?

A. About a year ago.

X Q. 104. Who was with you when it was bought?

A. I do not know.

X Q. 105. Do you refer to a man named Tuckman?

A. No.

Q. 106. He was not with you?

A. I could not say.

X Q. 107. What did you do with the socks?

A. Mailed them to the Notaseme Hosiery Co.

X Q. 108. You made a report of it?

A. Yes.

X Q. 109. Did you send it in the same form that you sent "Complainant's Exhibit, Defendants' Box" with the sales ticket inside?

A. I probably did.

X Q. 110. Was it an Irontex sock?

A. I could not say.

X Q. 111. Have you read over your reports to the house since this action was begun?

A. No.

X Q. 112. Did you have any conversation with anybody concerning the testimony in this case?

A. Yes.

X Q. 113. With whom?

A. Mr. Newman, Mr. Milander and Mr. Barr.

X Q. 114. Did you discuss with any of them your reports?

118 A. No.

X Q. 115. Never touched upon them?

A. No. I meant to say yes, just touched them.

X Q. 116. That is reference was made to them?

A. I was told that I would be required to identify the exhibit, and that any further testimony I might give, would hardly be necessary from me.

X Q. 117. I presume you mean that no other testimony would be asked of you?

A. That was all I believed.

X Q. 118. You did not think it prudent to refresh your recollection from your reports?

A. I did not think it necessary.

X Q. 119. Not even to the date of purchase of the box in evidence?

A. No.

X Q. 120. How long have you been in the employ of this company?

A. About two years.

X Q. 121. When did you go into their employ?

A. About two years ago.

X Q. 122. Can you fix the date when you entered their employ?

A. No. Along about the first of the year, some time in the early part of 1909.

X Q. 123. What business were you in before that?

A. Wall Street.

X Q. 124. A broker?

A. Had been selling for a broker.

X Q. 125. How long were you in Wall Street?

A. From about 1900.

X Q. 126. When you went into the employ of the Notaseme Co., did you familiarize yourself with the trade?

A. Not very much.

X Q. 127. Were you familiar with the various kinds of hosiery that were on sale in the various stores in New York that were at retail?

119 A. Somewhat.

X Q. 128. Prior to your connection with the Notaseme Co., had you dealt at Macy's?

A. I bought things occasionally.

X Q. 129. Did you buy any hosiery at Macy's prior to your connection with the Notaseme Hosiery Co.?

A. It has been my good fortune to have my hosiery come to me gratis for the last ten years.

X Q. 130. From the Notaseme Co.?

A. No, the Notaseme Company and its immediate predecessor began business about three and one-half years ago, but a brother-in-law of my wife has been a hosiery salesman since I knew him.

X Q. 131. Was he connected with the Notaseme Company or any officer of that corporation?

A. He is an officer of that company.

X Q. 132. What is his name?

A. Mr. Milander.

X Q. 133. And that gentleman with Mr. Newman either formed the firm or corporation that were the immediate predecessors of the Notaseme Hosiery Co.?

A. Yes.

X Q. 134. I understood you to say that these three visits that you made at Macy's were made in the very beginning of your employment with the Notaseme Co.?

A. No, but not very long after.

X Q. 135. You testified that the purchase was made April 4, 1909?

A. That particular purchase was made April 4, 1910.

X Q. 136. Have you refreshed your recollection as to that since lunch time?

A. Yes.

X Q. 137. What refreshed your memory?

A. Either I looked it up or I asked Mr. Newman.

X Q. 138. Looked it up, where, where can you look it up?
120 A. I didn't look it up, I asked Mr. Newman.

X Q. 139. Well, that could not refresh your recollection could it asking Mr. Newman about it?

A. Yes.

X Q. 140. Well, Mr. Newman told you it was 1910?

A. Yes.

X Q. 141. If Mr. Newman had said it was 1909 would that have confirmed your opinion?

A. No.

X Q. 142. You swore this morning it was 1909 and Mr. Newman's statement that it was 1910 refreshed your recollection that you had made a mistake?

A. Yes.

X Q. 143. No other circumstances were discussed?

A. Yes, the fact was brought up and I simply said "Now Arthur the fact of the matter is that I am not quite sure right now of the year of that purchase, it was the Spring of 1910, wasn't it?" He said, "surely," that was all.

X Q. 144. And that was all that transpired to refresh your recollection?

A. Yes.

X Q. 145. How about these other visits to Macy's that you have referred to, when did they take place, in the years 1909 or 1910?

A. In the years 1909 and 1910.

X Q. 146. You will have to go back then to the first time you went to Macy's. In your previous testimony you said that your first visit was either a few days or a few weeks prior to the purchase of "Complainant's Exhibit, Defendants' Box?"

A. Or a few months.

X Q. 147. Was it a year before?

A. I do not remember.

X Q. 148. Mr. Keefe, I would like to get with some degree of accuracy of the time you first visited Macy's for the purpose of ascertaining whether their label on hosiery resembled the label on Notaseme hosiery you were asked by your house to make that special investigation as you have testified. Please state when that visit took place?

A. I do not remember.

X Q. 149. You don't remember whether it was in 1909 or in 1910?

A. I think it was 1909.

X Q. 150. You don't remember whether it was the first half or the second half of the year 1909?

A. No.

X Q. 151. You can't remember whether it was within a week, month or six months prior to the time you made the purchase of the hosiery at Macy's which has been introduced into evidence?

A. I remember that it took some time but the exact time and dates cannot fix.

X Q. 152. Can you fix within a month?

A. The entire matter lasted more than a month.

X Q. 153. What matter?

A. My correspondence with the house and my various visits.

X Q. 154. Did it last a year?

A. I could not say.

X Q. 155. Did it last six months?

A. I believe so.

X Q. 156. If I understand you correctly for six months you knew that at Macy's they were selling hosiery with labels, wrappings and packings which you or your house consider similar to or infringements of the Notaseme labels, packing and markings and yet for six months you did not buy a box of hosiery at Macy's with that marking. Is that true?

A. I could not say.

X Q. 157. What will you say concerning the time? You have testified now that it was six months that intervened. Is that or is that not correct?

122 A. I cannot recall just how long it took.

X Q. 158. As a matter of fact you have no recollection on the subject at all?

A. Yes, I have.

X Q. 159. Well, state your recollection to the time that elapsed from the first visit to Macy's to examine the markings, labels and wrappings on hosiery and the date on which you purchased the

hosiery box marked in evidence "Complainant's Exhibit, Defendants' Box?"

A. I cannot state any definite time.

X Q. 160. State any recollection that you have as to the time that elapsed between those two periods?

A. If it makes any material difference I would rather be guided by reference to memorandum if I can find any.

X Q. 161. Have you any such memoranda?

A. I made memoranda at the time.

X Q. 162. Do you have that in your possession?

A. No.

X Q. 163. Will you produce that memoranda at the next hearing?

A. I do not know if I can.

Adjournment until January 18th, 1911, 11.30, by the agreement of counsel.

PHILADELPHIA, PA., January 18, 1911.

Met pursuant to adjournment. Present as before.

Cross-examination of Mr. KEEFE continued:

X Q. 164. Mr. Keefe, have you refreshed your recollections since the last hearing as to the dates when you went to R. H. Macy & Co.?

A. I did.

123 X Q. 165. How did you refresh your recollections?

A. By looking over some memoranda.

X Q. 166. Have you the memoranda that you looked over, here?

A. Yes.

X Q. 167. Please state the dates on which you made the purchase of the socks that were introduced in evidence as refreshed by your memoranda?

A. This purchase was made April 12, 1910.

(Witness refers to memorandum marked for identification "Exhibit A, Jan. 12.")

X Q. 168. This is the memorandum that you examined at the last hearing, isn't it?

A. Yes.

X Q. 169. How does that refresh your recollection as to the year when it failed to do so at the last hearing?

A. That does not refresh my recollection as to the year.

X Q. 170. I ask you now to refer to the memorandum which did refresh your recollection.

A. That purchase was made a short time prior to a purchase which I have here and on which purchase, which I have here, the date of the year does appear.

(Witness refers to memorandum.)

X Q. 171. You have now in your hand a paper parcel purchased by you at R. H. Macy & Co.'s?

A. Yes.

X Q. 172. And that was made when?

A. That was made July 19, 1910.

X Q. 173. More than a few days later?

A. A few months later.

X Q. 174. Was that the purchase that you referred to
124 in your last testimony as having been made by you at R. H.
Macy & Co.?

A. It was one of the purchases, yes.

X Q. 175. You only referred to two purchases at the last hearing.
One of them was the box in evidence and another one concerning
which you did not remember very much.

A. This is the other one.

X Q. 176. Is that a purchase of hosiery?

A. A purchase of hosiery at Macy's.

X Q. 177. And will you show me the memorandum which re-
freshed your recollection?

A. This memorandum consists of the package and a copy of my
letter which I sent with it.

X Q. 178. Now I understood you to say that the dates appeared
on the package. Will you let me see the package?

A. There is no memorandum on the package other than the
pencil writing.

X Q. 179. Is that yours?

A. It is mine.

X Q. 180. Is there any data on that other than July 19?

A. No.

X Q. 181. The year is not given, is it?

A. No.

X Q. 182. So that that memoranda did not refresh your recol-
lection?

A. This particular memoranda did not.

X Q. 183. Was your recollection based on something else than
the envelope memoranda I have here?

A. Yes.

X Q. 184. What is the memoranda in which you base your recol-
lection?

A. A letter which accompanied it.

X Q. 185. The letter which you wrote to the Notaseme Hosiery
Company fixes the date?

A. Yes.

X Q. 186. That letter is dated on what day?

A. July 19, 1910.

X Q. 187. Is that letter in reference to the purchase of April
4th?

A. No.

X Q. 188. Does that refresh your recollection as to any other
time that you went into Macy's when you did not buy any hos-
iery?

A. No.

X Q. 189. Can you now state with any greater degree of accuracy

than you did at the last hearing the first time that you visited Macy's for the purpose of ascertaining whether their label on hosiery resembled the label on Notaseme hosiery about which you were asked by your house to make an investigation of?

A. No.

X Q. 190. From your own memorandum which you found or reports which you made, did this refresh your recollection as to whether you went to Macy's for that particular purpose two days, two weeks, or six months before you bought the goods in evidence as "Complainant's Exhibit, Defendants' Box?"

A. No.

X Q. 191. You have no fixed recollection then as to when you first heard of the labels used by Macy's on their hosiery?

A. No.

X Q. 192. Did you have a distinct recollection that you did go there before you made that purchase?

A. Yes.

X Q. 193. And for the express purpose of inspecting those labels?

A. Yes.

X Q. 194. You made a report of that?

A. Report of it? Yes.

X Q. 195. Well, have you looked for that report?

126 A. That report was made in an oral conversation.

X Q. 196. You remember when that was?

A. Yes.

X Q. 197. When?

A. Only approximately.

X Q. 198. Well state approximately when it was done.

A. About a year and a half ago.

X Q. 199. That is in July, 1909?

A. I can't be as definite as that.

X Q. 200. Do you think it was as long as that before the purchase was made?

A. About that time.

X Q. 201. Well, then you do recollect that the first visit you paid to Macy's for the purpose was approximately nine months before you made the purchase?

A. Yes.

X Q. 202. You will fix on that now?

A. Yes.

X Q. 203. It did not happen two months before?

A. No.

X Q. 204. And it was at least six months before?

A. I judge so.

X Q. 205. And in the interim you made no attempt to either buy any hosiery at Macy's or to inspect the character of the labels they were using?

A. No.

X Q. 206. You know where the hosiery counter at Macy's was at the time you made the purchase?

A. About where it was, yes.

X Q. 207. Well, where was it?

A. I think it was about the third aisle from the Thirty-fourth Street door on the main floor.

X Q. 208. Do you know who was in charge of that department?

A. No.

X Q. 209. Speak to anybody who was in charge of it?

127 A. No.

X Q. 210. On none of the occasions you visited there?

A. No.

X Q. 211. You simply talked to the sales girls?

A. Yes.

X Q. 212. Can you identify any of the sales girls that you talked to—their appearance?

A. I could not.

X Q. 213. Could you give any description of them at all?

A. Only generally.

X Q. 214. Well, now, could you tell whether you talked to the same girl on each of the three occasions that you visited there?

A. No.

X Q. 215. Did you talk to different ones?

A. That I could not say.

X Q. 216. You couldn't tell how any of them impressed you?

A. No.

X Q. 217. Were there a number of girls there?

A. I think about three.

X Q. 218. Only three?

A. I say about three.

X Q. 219. Do you know whether they were the same ones of each occasion?

A. No.

X Q. 220. You do not know whether the same or different?

A. No.

Cross-examination closed.

Redirect examination by Mr. BARR:

R. D. Q. 221. Mr. Keefe, will you please state approximately the number of retail stores in the Borough of Manhattan to which you sell the Notaseme goods?

128 A. About thirty.

R. D. Q. 222. In your answer to X. Q. 16 you refer to Greenwald Bros.' store as being the only store in New York City proper. How do you differentiate this store from the thirty which you have just stated?

A. The only department store. Greenwald Bros. is the only store to which I sell personally and which is exclusively a department store as compared to men's furnishing stores.

(Complainant's counsel offers in evidence an envelope and contents and asks the notary to mark the same "Complainant's Exhibit, Envelope Purchase.")

By Mr. WISE: Objected to as incompetent, immaterial and irrele-

vant and is not properly proved, and furthermore as an article looked upon by witness to refresh his memory.

R. D. Q. 223. I now show you the object just offered in evidence and ask you to state what it is and what you know about it.

By Mr. WISE: Objected to as incompetent, immaterial and irrelevant.

A. An envelope of R. H. Macy & Co. containing pair of stockings and sales slip which I purchased July 19, 1910.

R. D. Q. 224. I note some writing on the envelope. Can you identify that writing and if so please state whose it is?

A. It is mine.

(Complainant's counsel offers in evidence a letter dated July 19, 1910, and asks the notary to mark the same "Complainant's Exhibit, Keefe Correspondence.")

R. D. Q. 225. I now show you the object just offered in evidence and ask you to state what it is?

129 By Mr. WISE: Objected to as incompetent, immaterial and irrelevant and as a communication from employee to his employer, which is not binding upon defendant and as a document intended to exploit original testimony.

A. This letter I wrote upon July 19, 1910, to the Notaseme Hosiery Company, accompanying that purchase which I sent to them.

R. D. Q. 226. Whose signature is attached to that letter?

A. Mine.

R. D. Q. 227. The trade-mark here in suit was granted May 8, 1909, and this bill of complaint was filed August 8, 1910. Will you please state whether or not the purchase of the box "Complainant's Exhibit, Defendants' Box and Contents" was made between the two dates?

By Mr. WISE: Objected to as incompetent, immaterial and irrelevant and as calling for a conclusion from the witness, thus usurping the function of the court.

A. It was.

Redirect examination closed.

Recross-examination by Mr. WISE:

R. X Q. 31. Mr. Keefe, the purchase on July 19, 1910, was made by you with the deliberate intent of securing evidence in an action to be brought, was it not?

A. I had no intention of bringing action.

R. X Q. 32. Had you any idea that an action was to be brought?

A. I had.

R. X Q. 33. Why did you hesitate about your answer?

A. I misunderstood you.

130 R. X Q. 34. You did not understand me to ask you a question as to whether you had brought an action, did you?

A. No.

R. X Q. 35. You were very particular in that letter, were you not, to state that that letter should be preserved as it might be useful to you for the purpose of refreshing your memory?

A. Yes.

R. X Q. 36. Do you remember at the last hearing when you were asked to refresh your recollection from memoranda, you stated you had no knowledge of any testimony which might be required of you other than the date of the purchase of April 10th, which is contained in "Complainant's Exhibit, Defendants' Box?"

A. Yes.

R. X Q. 37. Was that true?

A. It was then.

R. X Q. 38. When was it true? At the time you made the statement?

A. Yes.

R. X Q. 39. Do you remember I asked you at that time whether there was any friend with you and you stated you did not think so?

A. To which occasion do you refer now?

R. X Q. 40. At the time that you bought this second pair of stockings which did not then happen to be in evidence?

A. Would you mind reading that testimony?

R. X Q. 41. This testimony begins with X Q. 87. You were asked whether you bought any of the socks at Macy's in the years, 1908, 1909, 1910, which were sold to you as Notaseme socks. Your answer was yes. Then "Q. Where is that sock? A. I don't know. Q. What sock was it? A. I do not know. Q. Whose manufacture was it? A. I do not know. Q. Whose label was on it? A. I do not

know. Q. When was it bought? A. I do not know. Q. In 131 what year was it bought? A. About a year ago. Q. Who was with you when you bought it? A. I do not know. Q. Do you refer to a man named Tuckman? A. No. Q. He was not with you? A. I could not say. Q. What did you do with the socks? A. Mailed them to the Notaseme Hosiery Co.

A. At that time I did not remember, so said "I do not know."

R. X Q. 42. So that your recollection of what happened last July is a very faint one with you, unless it is refreshed by outside sources?

A. Yes.

R. X Q. 43. You have no recollection whatsoever without refreshing your memory, have you?

A. I have the recollection of it now that it is refreshed.

R. X Q. 44. Well, without that you have no recollection of it at all, as you testified at the previous hearing?

A. Oh! I certainly have a recollection of it.

R. X Q. 45. Well, then, was the testimony you gave at the last hearing true or not, when you stated you did not remember?

A. It was true.

R. X Q. 46. Then at that time you did not remember it?

A. No.

R. X Q. 47. And at that time you had no recollection?

A. I had a recollection, surely.

R. X Q. 48. Then you had no recollection of any goods purchased, when I asked you and you said "I do not know."

A. I had a recollection.

R. X Q. 49. Well, you answered that you did not know?

A. Yes.

R. X Q. 50. May I ask why you did that?

A. Because I did not remember and that should have been my answer.

132 R. X Q. 51. You did not remember and yet you state you have a recollection?

A. Yes.

R. X Q. 52. Will you please explain this?

A. I can't.

R. X Q. 53. What distinction do you make between them?

A. I do not want to quibble over words.

R. X Q. 54. Well, it appears to me that you are.

A. I simply have a recollection which was not definite and consequently in order to be exact, I said I do not know or do not remember.

R. X Q. 55. That is although you did remember, you stated you did not?

A. Yes.

R. X Q. 56. Now you went there with the deliberate intention in July, of laying a trap?

A. Yes.

R. X Q. 57. Knowing that your testimony would be read in an action against R. H. Macy & Co., by the Notaseme Hosiery Company?

A. Believing it would.

R. X Q. 58. Do you know when this action was begun?

A. I do not know of my own knowledge when it was begun.

R. X Q. 59. Did you not testify in answer to R. D. Q. 227 that the socks were bought between the dates that the action was brought and the trade-mark was granted?

A. Yes.

R. X Q. 60. Well, please fix the dates when these were done?

A. I don't remember.

R. X Q. 61. You answered a question that certain things were done between certain periods. Now I want you to testify when the dates were, not from anything your counsel stated.

133 A. That was the first time I heard of any.

R. X Q. 62. Then as a matter of fact, you did not know when you made that answer to Mr. Barr whether that purchase had been made between the occurrence of the two things that he referred to?

A. No.

R. X Q. 63. You did not?

A. No, except to assume that he was telling the truth.

R. X Q. 64. You assumed that he was giving you the right dates?

A. Yes.

R. X Q. 65. So that you did not know whether you had made that purchase between those two dates, as you testified you had?

A. No.

R. X Q. 66. Now what was the name of the man that went with you?

A. Tuckman.

R. X Q. 67. Tuckman was the man who went with you?

A. Yes.

R. X Q. 68. And at the last hearing you could not remember whether he went with you or not?

A. No.

R. X Q. 69. What refreshed your recollection as to that?

A. My memory.

R. X Q. 70. Your memory has been revived?

A. Yes.

R. X Q. 71. Please give the gentleman's full name and address.

A. I do not know his full name and I do not know his address.

R. X Q. 72. Do not know where he lives?

A. No.

R. X Q. 73. What business is he in?

A. Advertising man.

R. X Q. 74. With whom?

A. At that time he was with Paris Modes.

R. X Q. 75. That is an advertising house?

A. No, that is a fashion book.

R. X Q. 76. Where is that published?

(Objected to as immaterial and irrelevant.)

A. In New York I think.

R. X Q. 77. What was Tuckman's connection with them?

(Same objection.)

A. Advertising solicitor.

R. X Q. 78. You do business with them?

(Same objection.)

A. No.

R. X Q. 79. Is he still with that concern?

(Same objection.)

A. I do not know.

R. X Q. 80. How long since you have seen him?

(Same objection.)

A. I could not say, since September or October.

R. X Q. 81. You are not in the habit of seeing him frequently?

(Same objection.)

35 A. I have not seen him frequently.

R. X Q. 82. But you are sure that was the man who went

with you?

A. Yes.

R. X Q. 83. And went with you at the time you were laying this

up?

A. Yes.

R. X Q. 84. And you took him along as a witness?

(Same objection.)

A. Yes.

R. X Q. 85. And you do not know his full name?

A. No. I do not know.

R. X Q. 86. And you do not know his business address?

A. I do not.

R. X Q. 87. And you do not know his private address?

A. I do not.

R. X Q. 88. Did you take any memoranda from him as to what had happened?

A. No.

R. X Q. 89. Mr. Keefe, do you wish us to understand that in an attempt to secure evidence on what you considered a very material point, you secured the attendance of a witness who paid particular attention to every word you said and then you omitted to take that friend's full name, his business address or his residence?

A. Yes.

R. X Q. 90. You have had experience in litigation?

A. Yes.

R. X Q. 91. You have been in law suits frequently?

A. No.

R. X Q. 92. Occasionally?

A. Occasionally.

R. X Q. 93. You are familiar with the introduction of evidence in litigation?

136 A. Somewhat.

R. X Q. 94. You are familiar with the introduction of exhibits into cases?

A. Somewhat.

R. X Q. 95. You felt called upon to advise your house that the memoranda you made was of importance, did you not?

A. Yes.

R. X Q. 96. And you expressly requested them to keep your letter so as to refresh your recollection?

A. Yes.

R. X Q. 97. But when you came to the witness chair the first time you carefully avoided looking up the report and your recollection was not refreshed?

A. I did not avoid it.

R. X Q. 98. But you did not then think it of as much importance as at the time you made it?

A. No.

R. X Q. 99. You sell to thirty retail stores in the Borough of Manhattan?

A. About that.

R. X Q. 100. Those are with the exception of the one department store?

A. Yes.

R. X Q. 101. Can you furnish the more prominent ones?

A. Of my own trade?

R. X Q. 102. Of these thirty that you sell to.

A. In answer to your question, Mr. Wise, I want to ask you, do

you want me to confine my answer to my own sales or to the persons to whom the socks are sold, because they are sold to others.

R. X Q. 103. I do not make any limitation to your answer. In the first place you were asked about what stores you sold to and you stated to thirty retail stores. Now I ask you to give the more prominent ones of those thirty stores. Now whether you mean
137 by your answer that you have sold to thirty stores, that I do not know.

A. I will make my answer mean what I want to have it mean.
Broker Bros., Cooper Square.
Lambert's, Cortland Street.
Peyseis', Broadway.
Vogel's, Eighth Avenue.

A. Raymond & Co., Nassau & Fulton Streets.

R. X Q. 104. These are the only prominent ones?

A. These are the prominent ones.

R. X Q. 105. Are there any others of equal prominence?

A. That is a matter of judgment. I could not say.

R. X Q. 106. Which are the largest gents' furnishing stores in New York City, do you know?

A. The ones I have mentioned.

R. X Q. 107. Those are the largest ones?

A. Yes.

R. X Q. 108. There was no other department store that you sold to than the one that you mentioned?

A. Greenwald Bros.

R. X Q. 109. I move to strike out the answer. Mr. Keefe, I have repeatedly told you that I do not want to know anything about anybody else but what you did. I asked you if you sold to any other department store than the one mentioned?

A. No.

R. X Q. 110. When did you make a memorandum on this exhibit "Complainant's Exhibit. Envelope Purchase?"

A. July 19, 1910.

Recross examination closed.

Deposition closed.

WM. F. KEEFE.

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Arthur W. Newman.

ARTHUR W. NEWMAN, a witness produced on behalf of the complainant and having been duly sworn, testifies in answer to interrogatories propounded to him by Mr. Barr, as follows:

Q. 1. Please state your name, age, residence and occupation?

A. Arthur W. Newman, age 33, occupation, manufacturer of hosiery, Philadelphia, Pa.

Q. 2. How long have you been engaged in your present occupation?

A. About three and one-half years.

Q. 3. What is the name of your company you are connected with?

A. Notaseme Hosiery Company.

Q. 4. For what purpose was this company formed?

A. It was formed for the purpose of manufacturing and dealing in hosiery and other knitted goods.

Q. 5. Will you please state fully the history of the Notaseme Hosiery Company as the facts are known to you?

A. The Notaseme Hosiery Company was chartered May 1, 1909. It bought out, succeeded or carried on the business of the Milander-Newman Company, acquiring the plant, goods, the trade-mark rights and good will and all other assets of the Milander-Newman Company.

Q. 6. How did it acquire the business of the Milander-Newman Co.?

A. By a bill of sale, which is dated May 8, I believe.

Q. 7. What were these trade-mark rights that the Notaseme Hosiery Co. acquired by this bill of sale?

A. It was the trade-mark No. 73597.

(Complainant's counsel offers in evidence assignment paper and asks the notary to mark the same "Complainant's Exhibit, Assignment.")

139 Q. 8. Mr. Newman, will you please look at the object just offered in evidence and state what it is and whether or not you can identify the signatures?

By Mr. WISE: I have no objection to the assignment as an original document, signed by the parties purported to be signed by.

Q. 9. I now hand you an object marked in evidence "Complainant's Exhibit, Trade-Mark in Suit" and ask you to describe it and state just how it has been applied by the complainant company to its goods.

A. The trade-mark No. 73597 is a polygonal design, through which runs a diagonal band. It is colored black, that is the color of the diagonal band is black. This band separates two panels, an upper and a lower one and these panels are colored red. They show a sharp contrast to the black diagonal band and make a conspicuous and attractive design wherewith we designate our goods, our hosiery at least, and distinguish them from other hosiery. We place this design on a label at the end of the cover and sometimes on the bottom of each box, in which we pack our hosiery. We also have this same design on a folding ticket that we fasten to each pair of our hosiery in such a way that the face on which this design is printed, shows from the outside. We also put around our hosiery a strip of paper or band on which this same design is printed in the middle, which makes it show as soon as the cover of the box is removed and this same thing applies to the folding ticket that we fasten on the hosiery which is also in evidence as soon as the cover of the box is removed. Besides this we show this same design on our placards, show signs, stationery, street car signs, and all other advertising matter that we get out and furnish our trade with.

Q. 10. Mr. Newman, please look at this box marked "Complain-

ant's Exhibit, Complainant's Box" and state whether or not
 140 that box and contents shows the goods marked as you are
 accustomed to marking them?

A. It does.

Q. 11. Will you please state what you mean in your answer by
 applying the label to the bottom of the box?

A. I do not mean really the bottom of the box. I mean the lower
 half, in other words, I mean to distinguish from the cover of the
 box that we do not place all the labels on the cover of our box. We
 place some of them on the lower half of the box whenever the cover
 is so narrow that we cannot put the label on it.

Q. 12. Will you please now state what steps you have taken to
 notify the trade and the public in general of the ownership and use
 of this trade-mark?

A. We have placed the words "Registered, U. S. Patent Office" in
 small type below this design.

Q. 13. Will you please state, in a general way, how you have
 brought the goods, marked with the trade-mark here in suit, before
 the public?

A. We have employed salesmen who have sold our goods put up
 and labelled in this manner. We have distributed to the trade all
 kinds of advertising matter, such as show signs, placards, window
 cards, on which this same design appears. We have issued circular
 letters, etc., on which this design appears on the stationery on which
 they are written and we have distributed match booklets on the
 front of which this same design appears. We have advertised in the
 street cars, placing cards therein on which this design was very prom-
 inent. In other words we have used every means possible to adver-
 tise and exploit our goods and in all cases have made this trade-mark
 design of ours conspicuous so as to impress upon the public and
 dealers that this design designates and distinguishes our hosiery.

(Complainant's counsel offers in evidence the following exhibits
 and asks the notary to mark the same

141 "Complainant's Exhibit, No. 1, Placard,
 Complainant's Exhibit, No. 2, Letter Sheet,
 Complainant's Exhibit, No. 3, Envelope,
 Complainant's Exhibit, No. 4, Window Card,
 Complainant's Exhibit, No. 5, Announcement Card,
 Complainant's Exhibit, No. 6, Match Booklet.")

Q. 14. Will you please look at the objects just offered in evidence
 and state what they are?

A. They are the various advertising matter that we distribute
 to the dealer and the consumer for the purpose of popularizing our
 goods.

Q. 15. Will you please state approximately, in dollars and cents,
 the amount of advertising you have done in say the past three years?

A. I should say between twenty and twenty-five thousand dollars'
 worth.

Q. 16. About how much of this sum have you spent in New York
 City?

A. I should say ten thousand dollars' worth.

Q. 17. Will you please state approximately, in dollars and cents, the amount of business you have done in the past three years?

A. About five hundred thousand dollars.

Q. 18. How many pairs of hosiery does this sum represent?

A. Approximately three million pairs.

Q. 19. At the time the predecessors of the Notaseme Hosiery Co. started in business, was there any other hosiery on the market designated like this, to the best of your knowledge and belief?

A. There was not.

Q. 20. Will you please state whether or not this panel design mark which you have adopted, has been used continuously in your business?

A. It has been used continuously by the Notaseme Hosiery
142 Company and before that by the Milander-Newman Co.

Q. 21. About when did you first hear of the defendant company coming into this field and what were the circumstances as you know them?

A. I am under the impression that the very first time I heard of it was the latter part of the year 1908. It was mentioned to me by someone who had seen a display of the Irontex goods in R. H. Macy & Co.'s store and had told me that they had seen a display of our hosiery in Macy's. I knew at once that they must have been mistaken, since we did not sell R. H. Macy & Co. At the time I did not pay a great deal of attention to the same, since I thought there was a mistake, but later on, I believe in the early part of April, 1909, it was mentioned to me again and I came to the conclusion that there must be something in it and I talked the matter over with Mr. Milander of our company and asked him to investigate the matter the next time he was in New York City and he went into R. H. Macy's store several times and there saw these goods displayed in such a way that this design that they were using was prominent on the boxes and on show signs and the bands around the hosiery, etc.

By Mr. WISE: I object to anything that was done by anybody else but the witness. I move to strike out the answer as being incompetent, immaterial and irrelevant and unnecessary evidence.

Q. 22. What methods did the defendant employ in exploiting their goods?

By Mr. WISE: Objected to unless this witness knows of his own knowledge that they placed labels on the boxes of their Irontex hosiery on which they displayed this same design.

143 A. They placed bands around the hosiery on which was the same design and also used placards and show signs on which they displayed this same design.

By Mr. WISE: I move to strike out the answer unless it is of the witness' own knowledge.

Q. 23. Were these methods employed by defendant new and original methods with them?

A. They were not.

By Mr. WISE: Question objected to as calling for a conclusion on the witness which is to be determined by court.

Q. 24. What steps did you take, Mr. Newman, to protect your business interests in regard to these acts of defendant?

A. We referred the matter at first to our lawyers who told us that they thought it probably only necessary for us to write to R. H. Macy & Co. and they would, without a doubt, abandon the use of this design and therefore we wrote to R. H. Macy & Co. sometime during 1909 and explained to them about the similarity of this design and asked them if they would not discontinue the use of it. They did not reply to our communication for sometime but did reply to our letters of November 29th and I think December 2nd and 11th. I am not absolutely clear about these dates. However, they replied to three letters of ours and in which they claimed that the use of this design was not an infringement of our trade-mark and since we could get no satisfaction from this correspondence we came to the conclusion that it would be necessary for us to protect our interests in a legal way. We tried to do so without legal procedure by asking them to change this design and we also went as far as to send our attorney to consult with them and explain the matter fully to them. After failing in all these ways to get any satisfaction, we told our attorneys to proceed in a legal way.

By Mr. WISE: I object to statements of contents of any letter as not the best evidence. I move to strike out the answer in so far as it states conversations or communications had between witness and his attorneys, it being wholly incompetent, immaterial and irrelevant and not in any way binding on these defendants. I object to that portion of the answer which states the contents of letters, as not being the best evidence thereof, it being wholly incompetent, immaterial and irrelevant unless the witness himself wrote the letters. I further object to the statement of any of the contents of the letters from R. H. Macy & Co. without accounting for their absence by destruction or otherwise. I further object and move to strike out the answer in so far as it contains instructions from the witness or his firm or corporation to the attorneys as to what steps to take or as to any steps that his attorneys did take as being hearsay on the ground of being incompetent, immaterial and irrelevant and not binding upon these defendants.

Q. 25. In your answer, Mr. Newman, you state that "we wrote." Will you please state who wrote those letters?

A. Those three letters were written by the Notaseme Hosiery Company and I believe, signed by myself.

By Mr. WISE: I move to strike out anything concerning the contents or dates of any letters written, as not being the best evidence. In the absence of a notice to produce, objection is made to the contents of any letters written by either side.

Q. 26. What is your position with the Notaseme Hosiery Company, Mr. Newman?

A. I am one of the owners and the treasurer of the Notaseme Hosiery Company.

Adjourned for luncheon.

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After Luncheon.

Q. 27. Mr. Newman, will you please state what other steps, if any, besides those referred to in Q. 24, you took to protect your interests?

A. We instructed Mr. Keefe to go into R. H. Macy & Co.'s store and buy some of this Irontex hosiery so that we would have evidence that they were selling the same put up and labelled with this design.

Q. 28. Who is Mr. Keefe?

A. Mr. Keefe is our New York salesman.

Q. 29. When did you so instruct him?

A. I am not absolutely clear as to the exact dates but we did instruct him sometime during 1909 to go in and buy some of this hosiery so that we could see how it was put up. I told him verbally to attend to this matter sometime in 1909. There was no record kept of this whatsoever, simply because we, at that time, did not think it would reach the stage of legal procedure. However, in April, 1910, we wrote to Mr. Keefe to go in to Macy's and make a purchase of their Irontex hosiery in a box or package in which it was put up, which he did.

By Mr. WISE: I move to strike out the answer so far as it contains any instruction given to Mr. Keefe, any reasons that the witness had for giving such instructions other than those that might have been communicated to defendant or as to anything that Mr. Keefe did, not in the presence of the witness.

Q. 30. What became of this box or package which you state Mr. Keefe purchased?

By Mr. WISE: Objected to as incompetent, immaterial and irrelevant, asking witness to testify to something not within his knowledge.

146 A. Mr. Keefe sent this box to me and after I received this box with the letter from Mr. Keefe telling me when and how he made this purchase, I turned this box and letter over to our attorneys.

By Mr. WISE: I move to strike out the answer as incompetent, immaterial and irrelevant, on the ground that it is hearsay, on the ground that it refers to contents of letters.

Q. 31. Do you find in this room, Mr. Newman, the box and letter to which you refer? If so will you please indicate them?

A. This purchase of hosiery which was made by Mr. Keefe with which he accompanied his letter, was not in a box. It was in an envelope used by the firm of R. H. Macy & Co., and it is now in this room and here before me.

By Mr. WISE: I move to strike out any reference to purchase made by Mr. Keefe.

Q. 32. Will you please indicate the purchase you refer to as made in April 12, 1910?

A. Here it is. This box containing hosiery.

(Witness points to "Complainant's Exhibit, Defendants' Box.")

Q. 33. What is this envelope purchase you refer to?

By Mr. WISE: Objected to as incompetent, immaterial and irrelevant.

A. This envelope purchase was made by Mr. Keefe sometime after the purchase of the box and contains hosiery. Mr. Keefe accompanied this with a letter in which he explained the transaction and also with the sales slip of R. H. Macy & Co.

By Mr. WISE: I move to strike out any reference to what Mr. Keefe did in the absence of the witness or any statement contained in the letter written by Mr. Keefe.

Q. 34. When did this envelope containing hosiery and marked "Complainant's Exhibit, Envelope Purchase" come into your possession and what were the circumstances?

A. I received it through the mail from Mr. Keefe. It was sent to me by him after he had made the purchase.

By Mr. WISE: I move to strike out the answer in so far as it states what was done by Mr. Keefe or what was sent by Mr. Keefe after the purchase.

Q. 35. Will you please look at the object which I now hand you and which is marked "Complainant's Exhibit, Keefe Letter" and state what it is, if you know?

By Mr. WISE: I object to the question as it speaks for itself.

A. This letter is written by Mr. Keefe and addressed to the Notaseme Hosiery Company, according to instructions I gave him to make the purchase therein contained and the details of the transaction.

Q. 36. In your answer to Q. 24 you refer to certain letters which you wrote to the Macy Co. in regard to ceasing from infringing acts and I now ask you if you have those letters in your possession?

A. No, I have not.

Q. 37. What has become of them, Mr. Newman?

A. Those letters were copied in a letter book which was destroyed by being wet by water that was played on our building at a fire next door to our mill. This letter book was in the letter press at the time and was found the next morning to be completely ruined.

Q. 38. When did this fire occur, Mr. Newman?

A. This fire occurred in February, 1910.

(Complainant's counsel offers in evidence three letters and asks the notary to mark them, respectively, Complainant's Exhibit, Macy Letter, No. 1; Complainant's Exhibit, Macy Letter, No. 2, and Complainant's Exhibit, Macy Letter, No. 3.)

Q. 39. Will you please look at the objects just offered in evidence, Mr. Newman, and state what they are?

By Mr. WISE: The writing of the letters is admitted. The objection is made to them as incompetent, immaterial and irrelevant.

A. These three letters were received by us through the mail from R. H. Macy & Co. in reply to our several letters asking them to desist from using the design that we considered an infringement on our 'trade-mark.

Q. 40. What has been the result, Mr. Newman, of the acts of the defendant?

By Mr. WISE: Objected to as calling for a conclusion from the witness.

A. The fact that they have used the design that is so similar to ours and which we have spent large sums of money to bring before the dealer and the consumer as a means of designating and distinguishing our hosiery has caused us considerable loss and has made a great part of our advertising valueless, since the public are unable to distinguish between our trade-mark and the design that
149 R. H. Macy & Co. are using in connection with their trade-mark and are thereby misled into purchasing the hosiery of R. H. Macy & Co. put up in this manner, thinking it is the hosiery that we are advertising and placing on sale.

By Mr. WISE: I move to strike out the answer as stating merely a conclusion of the witness and as incompetent, immaterial and irrelevant.

Q. 41. Will you please state whether or not any of your salesmen have complained to you at any time as to loss of sales from the acts of the defendant herein?

By Mr. WISE: Objected to — incompetent, immaterial and irrelevant and as calling for hearsay testimony.

A. Mr. Keefe has often complained to us about this matter and the fact that quite a number of people have told him that they have bought some of our hosiery from Macy's. Our Mr. Milander, who also sells our hosiery in New York City has repeatedly complained of this same thing.

By Mr. WISE: I move to strike out the answer as hearsay evidence and as incompetent, immaterial and irrelevant.

Q. 42. Will you please state, Mr. Newman, whether or not the trade-mark herein has been used continuously by the Notaseme Hosiery Company in its business?

A. Yes, it has and also by the Milander-Newman Company, its predecessors.

Q. 43. Will you please state, Mr. Newman, whether or not this box and contents marked "Complainant's Exhibit, Defendants' Box" was purchased between May 8, 1909, and August 8, 1910?

A. Yes, it was.

150 By Mr. WISE: Question objected to as it calls for a conclusion of the witness as hearsay and not an act which defendant had performed himself or witnessed.

Direct examination closed.

Cross-examination by Mr. WISE:

X Q. 44. Mr. Newman, when did the Milander-Newman Co. first adopt such labels as you have described?

A. Nineteen hundred and seven.

X Q. 45. Can you fix the date?

A. Approximately, yes.

X Q. 46. Will you do so, approximately?

A. September, 1907.

X Q. 47. And that was the same mark that is now being used?

A. Same mark.

X Q. 48. Identical in every way?

A. No, with the exception that we did not have "Registered U. S. Patent Office" under it until after it was registered.

X Q. 49. Did you have the word "Trade-Mark" on it?

A. I believe that we did, yes.

X Q. 50. Other than the small black lettering referring to the registration, on the gilt edge of the band, the labels are identical?

A. Yes, they are identical.

X Q. 51. And the labels on the inside of the box "Complainant's Exhibit, Complainant's Box" were also identical with the old label?

A. The band is identical with the exception of the "Registered, U. S. Patent Office" which we added under the band when it was registered. The folding ticket, however, is slightly different from the ticket we formerly used in so far as the polygonal design that we used as our trade-mark was in a reduced form on the 151 folding ticket that we used when we first started. The design, however, is exactly the same outside of the fact that it was smaller and surrounded by white space instead of gilt space.

X Q. 52. This folding label so-called by you, is the one at the top of the center band?

A. Yes, with the wire fastening.

X Q. 53. And except that it is different in size it is identical with the one that you used in 1907?

A. I do not mean that the folding ticket is different in size. I mean that the polygonal design has been slightly enlarged from what it was on the old style box.

X Q. 54. But other than as to this, it is identical?

A. Yes. It had some printing matter on each side above and below the trade-mark design.

X Q. 55. Which does not now appear?

A. It does now appear and with other words. The design was in the middle of the ticket and we had a little printed matter above and below and around it.

X Q. 56. That is around the design you had a space of white, upon which there was printed matter?

A. Yes.

X Q. 57. The other label which you referred to has gold lettering on the band and otherwise it is identical?

A. Identical, which has never been changed since we adopted it.

X Q. 58. Except of course for the registered mark on it?

A. Yes.

X Q. 59. Was that a novel way of packing goods at the time you adopted this label?

A. It was.

X Q. 60. I am referring now not to any figure on the band or on the box. I mean the description of the box. Were not hosiery always packed in this way, with a band inside or around the goods and with a label in many instances at the top of the sock,
152 and with another label on the outside of the box or cover?

A. Yes they were.

X Q. 61. Was it not the uniform method of packing hosiery in boxes in that way for the retail trade?

A. Yes, the usual way of packing hosiery is to put a band around the several pairs that are put into a box and also labeling the box, but the folding ticket is a feature that has not always been employed on all hosiery.

X Q. 62. Is that a feature that was specially devised by you?

A. No, sir.

X Q. 63. It had been in quite common use?

A. Yes, sir, it had been in use. In quite common use.

X Q. 64. How about labels on the boxes in which hosiery was packed?

A. That had been in common use, in fact all hosiery and all kinds of merchandise packed in boxes must be labelled.

X Q. 65. You say must be labelled?

A. Is labelled.

X Q. 66. But in the hosiery trade for a great many years past, a label has been placed at the edge of the cover of the box, as a matter of universal practice?

A. Yes, sir.

X Q. 67. And the equally uniform universal practice has been where more than one pair of socks is packed in a box to put a band around them?

A. Yes, sir.

X Q. 68. The only thing in which you think yours differs from the majority of goods is that you have an additional ticket?

A. I think it differs from some but I do not bring this folding ticket up as an invention or originality of our own at all. It has been in use by other concerns.

X Q. 69. Which is not a distinctive mark?

153 A. Not at all.

X Q. 70. You have observed of course that in the box which has been introduced in evidence the folding ticket is absent, have you not?

A. Yes, sir.

X Q. 71. But that the label is present or rather the band is present and the label on the box in "Complainant's Exhibit, Defendants' Box?"

A. Yes, sir.

X Q. 72. At the time you adopted this label you were in the manufacturing business, were you not?

A. At the time we adopted this label we had just gone into business.

X Q. 73. You had not been in business before under that name?

A. No, sir.

X Q. 74. Form a new corporation?

A. Yes, sir.

X Q. 75. That is three years ago last November?

A. No, before that.

X Q. 76. I understood you to say November, 1907?

A. September.

X Q. 77. Well, three years ago in September?

A. Yes.

X Q. 78. Did you start manufacturing about the time that you adopted this label?

A. We started actual manufacturing in October.

X Q. 79. And you sold at wholesale from the city of Philadelphia as a central point?

A. Yes, sir.

X Q. 80. Have you any sales agencies anywhere else than in Philadelphia?

A. We did not have at the time, no.

X Q. 81. Have you any agencies for the sale of goods carrying a stock of goods in any place other than Philadelphia, at the present time?

154 A. We do not carry a stock of our goods in any other place but Philadelphia, excepting Chicago, where we have lately sent a stock of our goods to be distributed by our Chicago representative.

X Q. 82. You have traveling salesmen?

A. Yes, sir.

X Q. 83. And you started right in from the beginning to employ traveling salesmen?

A. From the very beginning Mr. Milander and myself were the only salesmen. We sold our entire production for sometime.

X Q. 84. And did you sell it in any particular locality?

A. No, sir. We sold it wherever we could. Both traveled.

X Q. 85. In a general way, where did you distribute your goods?

A. The first territories that we opened up were throughout the South, as far as Texas, through New England. These were the two territories we opened up first.

X Q. 86. That was during the first year, presumably?

A. The first part of the first year.

X Q. 87. You met with immediate success?

A. Yes, sir.

X Q. 88. What name did you give your goods?

A. Notaseme hosiery.

X Q. 89. And the goods were sold as Notaseme hosiery?

A. Yes, sir.

X Q. 90. And they received recognition in the market by that name, Notaseme?

A. We called them Notaseme hosiery just the same as most any manufacturer must call his goods something.

X Q. 91. Is all hosiery designated by a certain name?

A. No, not necessarily.

X Q. 92. Well, I inferred from your answer before that it was customary in the hosiery business for every manufacturer
155 to give some distinguishing name to his hosiery. Is that true?

A. I do not mean it in that light. I mean that the dealer and the consumer must naturally have something to ask for and the dealer would ask for the name of a firm or the name of a hosiery or whatever it might be but he necessarily must have something to ask for.

X Q. 93. Is it customary in the trade that hosiery receives a distinctive name of some kind?

A. Either a distinctive name or it is simply called by the name of the firm that is selling it. Similar to ours.

X Q. 94. Could you give me any instances of that where distinctive names have been given to hosiery?

By Mr. BARR: Question objected to as immaterial and irrelevant and not germane to the direct deposition.

A. I think I could give you some names. I do not believe I can just recall any at the present moment.

X Q. 95. Do you recall any hosiery sold under the name of the manufacturer?

A. There is hosiery put up by Wilson Brothers which is marked "W. B." There is hosiery put up by Frederick Victor & Achelis marked "V. H." Hosiery put up by Marshall Field called, I think, Burlingham, I am not sure.

X Q. 96. Are they wholesale manufacturers?

A. No, but they sell hosiery to retail trade.

X Q. 97. They sell hosiery to retail trade under their own names and with certain initials or names given to them which distinguish them from hosiery sold in other dry good stores?

A. Yes.

X Q. 98. They do not indicate manufacturers?

A. No.

X Q. 99. Is that true of the first one that you mentioned?
156 A. Wilson Brothers? Yes.

X Q. 100. They are also retail manufacturers?

A. No, jobbers.

X Q. 101. Where are they?

A. Chicago.

X Q. 102. You do not recall any hosiery that is sold and identified either by a trade name or by the manufacturers' name at the present moment?

A. No, I do not.

X Q. 103. Those particular kinds of hosiery that you referred to are sold at retail with the same bands and labels as the goods

you sell? I mean not the same design on them but labels and hands on the boxes?

A. All hosiery is.

X Q. 104. Sometimes the labels are put on the cover of the box at the edge and sometimes they are put on the box itself and partially covered by the lid?

A. Yes.

X Q. 105. Now, during that first year that you were in business and where in the early half of it you sold to New England and the South, did you advertise your goods?

A. Yes.

X Q. 106. In the public press?

A. In the trade journals and by distributing show cards and placards, etc., and by circular letters.

X Q. 107. These circulars you wrote to people whom you solicited business from?

A. Yes, sir.

X Q. 108. Now show cards are the cards that you put into boxes that you ship?

A. No, by show cards I mean some cards that are to be used by the dealer when he makes a display of the goods. He uses that in the place of price tickets. Instead of making his own price tickets, he uses what we furnish as show cards and on which we exhibit our trade-mark design.

X Q. 109. And you furnish those naturally, only to those who bought from you?

157 A. Not in all cases. We frequently sent them to people that were prospective customers.

X Q. 110. Well, you confined the distribution of those show cards to either customers or persons whom you wanted to become customers, by direct solicitation?

A. Yes, sir.

X Q. 111. Are any of those show cards in evidence now amongst the labels introduced to-day in your testimony?

A. No, none of these are the ones that we used, as we have of course used up from time to time, one lot and gotten out something new, which we are doing all the time, but in all cases we have kept the same trade-mark design on everything. We did advertise in trade journals.

X Q. 112. In what journals did you advertise?

A. We advertised in the Haberdasher, a New York publication.

X Q. 113. Is that paper still in existence?

A. Yes.

X Q. 114. In any other paper?

A. Not as far back as that.

X Q. 115. Any other journal that you advertised in?

A. No.

X Q. 116. Advertise in any magazine?

A. No.

X Q. 117. Advertise in any weekly journal?

A. No.

X Q. 118. Of course this refers always to that period we are now discussing. The first six months of the first year.

A. Well, I do not know as that would cover the first year, as I think perhaps we did do some advertising outside of that. However, in no trades journals except the *Haberdasher* in the first year. That I can positively assert.

X Q. 119. In any other journal or any other magazine during that period?

158 A. No journal or magazine. I believe, however, that we did some advertising in some newspapers.

X Q. 120. Where?

A. I can't tell you now. It was done for various customers of ours that were exploiting our goods and we paid for some advertising in local papers. We have kept no record of them whatsoever.

X Q. 121. When you sold in a special town where you wanted to increase your trade, you advertised that dealer who had bought from you as dealing in Notaseme stockings. That is right, is it?

A. Yes.

X Q. 122. Did that both for the convenience of the dealer and for the purpose of increasing your trade and creating a demand for the goods?

A. Yes.

X Q. 123. Notaseme was fixed upon by you for the purpose of describing your goods to some extent, was it not?

A. Well, no. It was simply used as a sort of a title. Because we wanted to call them something.

X Q. 124. Well, is it not a fact that you distinguished your goods in the trade from the goods of other rival manufacturers by pointing out that there was no seam in the hosiery?

A. Not at all. There are large quantities of hosiery manufactured and put up in this country without any seams, just the same as ours and we could never have distinguished our hosiery from other seamless hosiery by that name. Seamless hosiery is sold in this country to the extent of about fifty million dollars annually, as I am informed and the only way that we could distinguish our hosiery was by the design that we placed on it.

X Q. 25. Well, it is a fact that this hosiery is seamless?

A. Yes, sir.

159 X Q. 126. Can you inform me whether the *Irontex* is seamless? The defendants' goods?

A. I do not know.

X Q. 127. Never examined as to that?

A. Never went into that idea any. I do not know the various kinds they are selling under that name.

X Q. 128. Did you examine the purchases that were bought and sent to you and labelled as *Irontex* hosiery?

A. I did not examine the hosiery at all.

X Q. 129. You do not know whether it is seamless or whether it is not?

A. No, I do not. I have never examined them.

X Q. 130. The name Notaseme was designed to indicate that your hosiery was seamless, was it not?

A. Well, not especially. Of course it does indicate that it is seamless. It was not particularly chosen on that account.

X Q. 131. It was not chosen on that account?

A. Not particularly, no.

X Q. 132. Well for what other purpose could it possibly have been chosen than to indicate that the articles were seamless?

A. Simply to give it a name of some kind.

X Q. 133. And that was the name that you thought best described them or at least a description of one feature of them?

A. That name we thought would be a good name, yes.

X Q. 134. Catchy name?

A. Yes, catchy name.

X Q. 135. One which could be easily remembered?

A. Not particularly easily remembered, for we find that it is not easily remembered.

X Q. 136. You find that it is not easy to remember the word Notaseme?

A. In practice it is not easy to remember. People call our hosiery by all kinds of names that are similar to it.

160 X Q. 137. For instance, could you give any illustration?

A. We have people call our hosiery Noseam and Notseam and similar names of that sort.

X Q. 138. But they all contain the idea that the hose is without seam, do they not?

A. Yes, I suppose they do. People that make those mistakes simply have heard or read that name and get it twisted.

X Q. 139. They simply remember the cardinal idea that there is no seam in the sock that you make. Is that not right?

A. I do not know that that thought impresses itself on them. They simply have seen the name and try to remember it and do not get it right, that is all. I do not believe the average person that is not interested in hosiery thinks that far at all about it. Simply wants to call the name of the hosiery and can't remember it quite and gets it mixed up.

X Q. 140. If there are so many other seamless hosiery why should he select yours?

A. Because he thinks our hosiery is the best for the money. He may have tried it before or he may have been influenced by our advertising and he has been impressed by this design that we are continually using.

X Q. 141. Which design?

A. This trade-mark design.

X Q. 142. You mean the polygon?

A. The polygonal figure that we use as our trade-mark and he is impressed with this. The picture of this is in his mind and when he goes somewhere to make a purchase he necessarily cannot go into details describing this polygonal design. He simply tries to remember a word that he saw and then he uses that simply to distinguish the hosiery or if he can't remember the word he does identify our

goods, if they are in view at all, by the label which is conspicuous. He frequently will simply point to the box and say, "I will have some of that hosiery," because he remembers that design.

161 X Q. 143. But you do not sell at retail, so you cannot speak of your own personal knowledge of it?

A. I can speak of my personal knowledge because I have gone on the road a great deal and have spent a good deal of time in the stores of my customers and I have watched people come in and point to the stock where they were carrying this hosiery of ours and say, "Let me have a pair of that hosiery," and it was quite evident that they recognized it by the very attractive label which is always showing.

X Q. 144. Well, that was the deduction that you made from their action?

A. Yes, it was the deduction of course.

X Q. 145. Now is it not a fact, Mr. Newman, that you considered that name Notaseme printed in conspicuous and noticeable script across the fact of the black band a very important feature of the attractiveness of your mark?

A. Not at all. It was not considered an important feature in the attractiveness, whatsoever.

X Q. 146. Did you not consider that name printed in that conspicuous way as an important feature for the marketing of your goods?

A. It was important in so far that we wanted to give our goods a name of some kind but as far as being important in being attractive, it was not at all. Our design would have been just as attractive if the polygonal band had been solid black.

X Q. 147. Well, has it ever occurred, as long as you have been in business, that you did not print that name on the label in a conspicuous way and always on the black back-ground?

A. No, it has never occurred.

X Q. 148. Not since the present Notaseme Hosiery Company has been in business or prior to that time when the Milander-Newman Company was in business?

A. No.

162 X Q. 149. Now you told me that the label is identical in every respect with the label that you adopted as Milander-Newman Company, barring the letters "Reg. U. S. Pat. Off."?

A. Yes, it is identical with the exception of slight variations in the ruling around it. We have varied that somewhat. In some cases we have a little gold frame around it and the printer has at various times, stuck a little gold in in places which did not really have the general make up of the design.

X Q. 150. But the figure, the color and the name Notaseme have not undergone any changes?

A. No.

X Q. 151. Now I hand you "Complainant's Exhibit, No. 1, Placard," and ask you to compare that with the label at the end of the box marked "Complainant's Exhibit, Complainant's Box?"

A. In what way do you mean me to compare it?

X Q. 152. Is there not a difference in the way the figures are shaped?

A. Yes, there is. There is that difference. As you can see, the proportions of the figure must be changed to suit the particular label or production that it is suited for. We find that on a narrow band we cannot get the figure the same proportion as we can in other places. For instance, you will note that the label is narrow and wide and the band is almost square and that the folding ticket is slightly longer than it is wide and that is simply, as we have understood, a matter which is of no import as long as we have stuck to the design itself. Whether it is long or narrow or wide or otherwise makes no difference. We have had to adapt it to the various uses we put it to.

X Q. 153. The fact is that you have had different shapes for this trade-mark depending upon the use to which you intended to put the label?

A. Not different shapes. It depends upon what you want to call a shape. We had different proportions of the figure. The figure has always been the same. It has always been a polygonal design, divided by a diagonal strip with a panel above and below the diagonal strip, colored red and a diagonal strip black and the proportions have been differed.

X Q. 154. For instance on the "Complainant's Exhibit, Complainant's Box," the figure is a rectangle, being about three times as long as it is wide. Is that not so?

A. Yes, I think that is called a rectangle.

X Q. 155. Well, in this rectangular figure, the proportions are about right? From two and a half to three times as long as it is high?

A. I should say so, yes.

X Q. 156. And the black band runs diagonally from the upper left hand corner to the lower right hand corner?

A. Yes, sir.

X Q. 157. And the black band in each instance takes up about two-thirds of the height of the figure on the extreme edges?

A. Yes.

X Q. 158. And the red panels are triangles?

A. Yes.

X Q. 159. The face of which is about one-third of the height of the figure?

A. I should say so, yes.

X Q. 160. And the length of the triangle is about three-quarters of the figure?

A. Yes.

X Q. 161. And across the band is written Notaseme with a flourish at the end of it in large letters about one-third the size of the height of the label?

A. I should say that was about the proportion, yes.

X Q. 162. Now on the band used as a wrapper for the socks contained in the box, the figure is a square, is it not?

A. Yes.

164 X Q. 163. The black band is reduced to approximately one-third of the height?

A. Yes.

X Q. 164. The triangles are practically double in size are they not?

A. I should say so.

X Q. 165. And the letters Notaseme are about one-quarter of the size of the label?

A. Hardly that. I should say about one-sixth.

X Q. 166. Well, the capital end is one-quarter?

A. Yes.

X Q. 167. Then on top of the sock there is the folding ticket. There is a shape different from either of the others. It is not quite a square and it is not as high?

A. No. That is simply done to suit the purpose, because it must be a narrow ticket. To make it narrow and of proper dimensions, it slightly changes its proportions. However, as you will notice the effect on all three is about the same with the difference in the proportions. The design once seen in any one of these forms will always be recognized in any one of them.

X Q. 168. In that folding ticket the black band does not run from the upper left hand corner to the lower right hand corner as in the other designs, does it?

A. It does not run absolutely from one corner to the other. It runs diagonally across and has its high point on the left side and its low point on the right side.

X Q. 169. But it does not run from corner to corner?

A. No.

X Q. 170. It begins approximately one-fifth of the distance from the top and it ends about one-fifth or one-sixth of the distance from the bottom on the lower right hand side?

A. Yes.

X Q. 171. The red panels are no longer triangles, are they?

165 A. No.

X Q. 172. They are irregular figures?

A. Yes.

X Q. 173. In this exhibit, "Complainant's Exhibit, No. 1, Placard," you have a figure of a somewhat different shape again, have you not?

A. Different than which?

X Q. 174. Different from any of the others?

A. No, it is about the same as the folding ticket.

X Q. 175. Well, the folding ticket is almost a square, is it not?

A. I think the proportions of the placard in the design on the placard are about the same as the proportions on the folding ticket. They may be slightly varied in the proportions. I have never gone into any of that detail.

X Q. 176. Well, roughly speaking, would you not think that this folding ticket more nearly approached a square than the figure on the placard?

A. I rather think it would.

X Q. 177. The placard figure rather looks like the label on the box "Complainant's Box" stood on end with the band varied, does it not?

A. Hardly that.

X Q. 178. Not quite as narrow as that?

A. No.

X Q. 179. Well, it is different from all of these in that it is higher in proportion to its width than any of the others?

A. Yes.

X Q. 180. And on that label the black band also starts about one-quarter of the distance away from the upper left hand corner and ends about one-quarter of the distance below the right hand corner?

A. Yes. I may explain in answer to these questions that we have always used this latitude in our design, that is we have varied the different proportions of our design, simply because all that we understood we would have to adhere to would be the figure 166 with a black diagonal band running through it and dividing it into two panels, upper and lower, one colored red and the diagonal strip black, in making this striking contrasts and producing this effect. In other words, I mean that the same effect has been produced in them all, while the proportions have slightly been varied to suit the purposes to which they were applied.

X Q. 181. As I understand you then, you have used these forms indiscriminately, depending upon the purpose to which they were to be put?

A. The different proportions we have used indiscriminately.

X Q. 182. Well, there are four apparent variations of this polygonal figure, with a black band, which are in evidence?

A. They are only variations in so far as proportions are concerned.

X Q. 183. In two of them there are also variations in position as to the diagonal band, are there not?

A. No. You will find that the black band in all cases makes an equal diagonal division of the polygonal figure. In other words the red is equally divided on both sides.

X Q. 184. But the position of the black band is varied. You might run it across the middle and the red would be equally divided, would you not?

A. I do not quite get your meaning.

X Q. 185. If you run a black band transversely across the red field you would divide the upper and lower panels in equal proportions?

A. Of course you would.

X Q. 186. What I am referring to is that the black position has been varied in at least two of these labels from the position where it commences directly at the edge of the left hand upper corner and runs down to the edge of the right hand lower corner of the figure?

A. I should not put it that way. I do not think that 167 the position of the black diagonal band is changed at all. I think that the red panels above and below the black diag-

onal band have simply been increased and decreased, according to the uses that the trade-mark was put to.

X Q. 187. But by the variation of the position of the black band, the red panels have received different geometric figures?

A. I do not think that I can go into great deal about that as I simply explained that the black band equally divides the red above and below and that the red is simply increased and decreased. That is all that I can say.

X Q. 188. I ask you whether in your opinion the shape of the red panel is not different in "Complainant's Exhibit, Complainant's Box" and in "Placard No. 1"?

A. I would say from a geometric standpoint, it is.

X Q. 189. Is it not a fact that "Placard Exhibit 1" is a triangular figure with three sides and in the other it is a four-sided figure?

A. Yes, it is.

X Q. 190. Well, it is the fact, is it not?

A. Yes.

X Q. 191. And the change in the shape of the panels is due to a change in the position of the black band, is it not?

A. No, I do not think so.

X Q. 192. You think that the position of the black band with reference to the upper side of the figure has not been changed?

A. No, I do not.

X Q. 193. And you think that the position of the black band with reference to the lower side of the figure has not been changed?

A. No, I do not.

X Q. 194. A few moments ago, you described the band in "Complainant's Exhibit, No. 1" inclosing the hosiery as terminating at the lower right hand edge of the figure and in "Placard, 168 No. 1" as terminating about one-fifth of the space from the edge of the figure?

A. Yes. It seems to be entirely a matter of viewpoint. I place the responsibility on the red figures themselves and you are trying to fix it on the black diagonal strip. The black diagonal strip remains a middle divider and the red panels on each side of it are simply of different proportions. They, nevertheless, are equal and are divided by the black diagonal stripe.

Adjourned until Monday, January 23rd, at 11.30.

PHILADELPHIA, PA., January 23, 1911.

Met pursuant to adjournment. Present as before.

Cross-examination continued.

X Q. 195. At the last hearing, Mr. Newman, you described the various exhibits 1 to 6 and you remember we discussed the variations in the shape of the red field?

A. Yes.

X Q. 196. Your last answer was, "It seems to be entirely a matter of viewpoint. I place the responsibility on the red figures themselves and you are trying to fix it on the black diagonal strip. The

black diagonal strip remains a middle divider and the red panels on each side of it are simply of different proportions. They, nevertheless, are equal and are divided by the black diagonal strip."

I do not quite understand what you mean by placing the responsibility on the red figures themselves. What do you mean by that?

A. In your various questions you asked me if it were not true that the black diagonal band on these different figures is not in a different position and my answer is that the black diagonal band is in the same position at all times. In other words, it is in the middle of the whole figure and it divides equally the red panels, that is the red panels are of equal size above and below it. In other words it is simply a case of the red panels being larger on some of our labels and signs, etc., than on others.

X Q. 197. That is exactly what I wanted to have you explain. Is it merely a difference in size that you referred to? Is it not a fact that it is also different in shape? Referring always to the red panels.

A. The enlarging of the red panels on each side of the black diagonal band does change the shape of it from a geometrical standpoint.

X Q. 198. From an actual standpoint is it not true, regardless of whether the upper and lower panels are equal in size? Is it not a fact that the shape of the red panels is changed by reason of the black diagonal strip starting at different points?

A. No, that is not the reason. The reason is because the red panels on each side of the diagonal band are carried out further on the various proportions of the designs that we use. The red panels, if I have to be technical about it, are of a different shape, geometrically, but the effect is absolutely the same in all cases. They simply are equal red panels on each side of the black diagonal stripe.

X Q. 199. Your answer to the effect that there are no differences in the red panels, refers merely to size, does it not?

A. Size and proportion. I will admit to there being a difference in the geometrical shape of the panels on each side. There is a difference.

X Q. 200. Your answer implies that the black band is in a fixed position in practically all the designs but that the red panels infringe upon the field of the black band. Is that the correct understanding of your answer?

170 A. I do not think I catch your meaning. I can't understand it that way at all. I do not know what you mean by infringing on the black diagonal band.

X Q. 201. Your answer to the last questions has been that it was merely a matter of viewpoint. From your standpoint the red panels were enlarged, that was all. Is that correct?

A. I still do not think that the position of the black band has been changed. I think that the size, proportion and the actual geometric shape of the red panels above and below the black diagonal band have had to be changed to suit the various purposes to

which we have applied our labels. That is what I mean to bring out. You are trying to fix the responsibility on the difference in position of the black diagonal band and the fact that it has been placed in various positions on the whole design and it has not. It has always been in the middle. We have simply changed the size, proportion and shape of the equal red panels above and below the black diagonal band.

X Q. 202. Barring the consideration of the red panels entirely by taking cognizance only of the proportion and size of "Complainant's Exhibit, No. 1, Placard" and comparing it with the band of "Complainant's Exhibit, Complainant's Box," has not the position of the band in the one a different location with reference to the perpendicular sides than the other?

A. No, sir, it has not. By perpendicular sides you mean the side lines. Of course I understand what perpendicular means but I wanted to be sure about it. In answer to that question I could say this, that the black diagonal band has not changed its position. If we were to draw an imaginary line in the middle of those perpendicular lines, that is an imaginary line across from one perpendicular line to the other in the middle, you will find that the black diagonal band in all cases will strike that line—the middle of that line.

In other words, will cut across it.

171 X Q. 203. But you are not giving the comparison I have asked you to make. You are comparing the black band with the whole field. Now I am asking you to make the comparison with reference to the perpendicular sides alone.

A. Which I am doing.

X Q. 204. No, I think not.

A. If we were to draw a line in the middle, midway between those perpendicular lines or sides as you call them, the black diagonal band would in all cases cut across that line midway and there would be as much above as below it.

X Q. 205. You mean that that horizontal line that you would draw would bisect the diagonal black band?

A. Equally, yes, and that the imaginary line would equally bisect the black diagonal band. In other words, the position of the black diagonal band has not been changed in any case whatsoever. It is simply that we have carried the red panels above and below to a further extent in the different cases. That is my contention.

X Q. 206. I am merely trying to establish what appears to the eye to be the fact—that the black band in the one case starts from the rectangle of the upper left hand side and in the other case starts from a distance about one-fifth below the rectangle of the upper left hand side.

A. I do not catch your meaning there.

X Q. 207. The rectangle is the point in the figure formed by the intersection of the perpendicular and horizontal lines.

A. I should say that is the very point that is not plain to the eye. There is only one thing plain to the eye in our trade-mark. That is there is a black diagonal band which separates the two red panels and anybody looking at our trade-mark casually could not

1 what proportion or what shape these red panels are in or never
ould. We produce an effect there of a black diagonal band and
red panels below and above it which produces a very sharp
2 contrast and which is very conspicuous and that is about all
that is impressed on the eye in looking at our trade-mark.
does not make any difference what the proportions of the red
panels are, the effect is absolutely the same in all cases.

X Q. 208. Well, you are drawing your own conclusions from
at?

A. Yes, sir.

X Q. 209. As a matter of fact, whatever conclusions you or any-
body else may draw from the juxtaposition of colors, the geometric
figures of the red panels are varied, are they not, in these two dif-
ferences that I have referred to?

A. There is a slight variation in the geometric shape of the red
figures.

X Q. 210. And the variation is due to the fact that in one the
d panels are formed into triangles by the black band starting from
the rectangle of the upper left hand corner and entering the rect-
angle on the lower right hand corner?

A. I should put it this way, that the shape and proportion of
the red panels above and below the diagonal band are from a
geometric standpoint, changed on account of the black diagonal
band starting all the way up in the right hand corner of the red
panel and going down into the right hand corner from the opposite
side in one length of it but in others the red panels are carried on
higher and lower so that there is no corner produced where the black
diagonal band corner from the opposite side in one length of it but
side.

X Q. 211. The corner is about one-fifth of the length above it?

A. Exactly.

X Q. 212. When you say the red panels are extended, Mr. New-
man, you do not mean I presume that the design "Complainant's
Exhibit, No. 1, Placard," was in fact the same design as the
73 others and then an additional was made to it?

A. No.

X Q. 213. It was an original drawing with the figure of different
shape to suit your purpose?

A. Exactly.

X Q. 214. And in that particular drawing, the figure was shaped
to suit your purposes and exigencies. That figure in your hands
required the red panels to be different shapes?

A. Did not absolutely require it, no.

X Q. 215. Well, it must have required it?

A. We deemed it of no import whatsoever. Designs like that
were submitted to us by the various advertising people or printers
that have done our work for us and we deemed it of absolutely no
import whatsoever to confine ourselves to a certain size, proportion
or shape of that geometric figure of the red panel above and below
with the extension. Of course we would not have gone to any other
marked variation from it. We would not have made it into a

circle or a star or a crescent or anything of that sort, but after all, there is really very little difference. The effect in all cases is the same and unless it is gone into very technically nobody would ever notice the difference.

X Q. 216. As I understand you then, the various designs that were submitted to you, so long as they retained the colors, the red field with the black band fairly equally divided, was the important thing. The shape of the figure and of the red panels were minor matters?

A. Not exactly that, no. I won't say that. In the shape of the whole figure, not the shape of the panels. We have struck to a square or a rectangle which to the casual observer are about alike. There is very little difference between them and as far as the red panels are concerned, the only difference between them is one is a triangle and in other cases they are almost triangles. They just fail a little in being triangles. I do not know what the exact
174 geometric term would be for that figure, but it is so near a triangle that there certainly would be no mistaking it in any way. It does not look to me to be very important whether it be called a triangle or whether something else.

X Q. 217. Would you say that that field with the lower half covered over is nearly a triangle, referred to "Complainant's Exhibit, No. 1, Placard?"

A. Yes, I would say that from the distance it could almost be taken for a triangle as far as that is concerned, as it has three almost equal sides. There is a little extra space in there that makes it have four sides, but at a distance it would almost have the effect of a triangle.

X Q. 218. Mr. Newman, anybody knowing what a triangle is would, at the distance you are sitting from me, say approximately six or eight feet, never call that a triangle, would they?

A. Not if he knew the true meaning of a triangle.

X Q. 219. Would you take that for a triangle at this distance?

A. No, no one that would know the true meaning of the word "triangle."

X Q. 220. I understood you at the last hearing to say that you advertised for some of your customers in the first six months of your business as Milander-Newman Company in local papers, is that true?

A. I said that I thought we had. I did not make it a point that I am sure nor am I sure now that we did. I simply have a faint recollection of having requests from people and having people deduct charges in making remittances to us for advertising they had done. Just when that was done or how I could not say.

X Q. 221. Have you any recollection of any house or any particular locality where that was done?

A. Not now.

X Q. 222. Are you aware of whether you pursued any
175 such course at any period subsequent to the six months that we were discussing?

A. No, we did not do a great deal of that. We soon made it

quite a point to attend to all the advertising that we did ourselves and do it ourselves.

X Q. 223. So that if you did advertise, it was a very inconsiderable amount of it and not any to be considered at all?

A. Very inconsiderable. I would just as soon not consider it. We have never done very much newspaper advertising for various reasons. The main reason is that we could never show our trade-mark in a newspaper design properly because you cannot reproduce colors and we could never get the effect of our trade-mark in any way.

X Q. 224. Have you done any newspaper advertising showing this rectangular figure?

A. I do not know that we have. I do not think so.

X Q. 225. Have you advertised in any publications of any kind?

A. Yes.

X Q. 226. In what publications have you advertised. You have mentioned the Haberdasher at the last hearing.

A. We have done our advertising to the consumer principally through the display stuff that we get out for window work and show cases and we get out placards and that sort of stuff and street car signs but our advertising to the consumer has been practically confined to the Haberdasher and we have done some advertising in the Chicago Apparel Gazette and the publication of the Fairchild Company, I cannot think of the exact name.

X Q. 227. Have you got any of those advertisements here that you published in the Haberdasher or the Chicago paper?

A. Yes.

X Q. 228. Have you them within easy reach?

A. Yes.

176 X Q. 229. May I see one?

A. I have one of them here.

X Q. 230. Will you let me see it please?

A. Yes.

(Witness produces Haberdasher of January, 1911.)

X Q. 231. You refer to page 15 of the Haberdasher, a publication of January, 1911, that publication being a New York concern doing business at 19 Union Square?

A. Yes, sir.

X Q. 232. And this is the paper in which you advertised from the start?

A. Yes, sir.

X Q. 233. As Milander-Newman Company?

A. Yes, sir.

X Q. 234. By the way, Mr. Newman, before that corporation was formed, in what business were you?

A. In the hosiery business.

X Q. 235. Were you in business for yourself?

A. No, sir, I travelled for hosiery.

X Q. 236. And Mr. Milander?

A. Also travelled for another concern, both in New York City.

X Q. 237. And you did not form a combination until September, 1907?

A. I believe the company was chartered August 1st, 1907.

X Q. 238. Well, it was in August or September, 1907, that you started in business with Mr. Milander under the corporate name of Milander-Newman Company?

A. Yes, sir.

X Q. 239. And you began advertising in the *Haberdasher* right from the start?

A. Yes, sir.

X Q. 240. Was your advertisement in the same form as this one here?

177 A. We did not have the words "Reg. U. S. Pat. Off." underneath.

X Q. 241. Well, barring that?

A. It was about the same. I think it was about the same, yes. So close to it that I could not say now what the difference was. I believe there are some slight differences in the ruling around it. Of course that is something the printer always attends to.

X Q. 242. Was the shape of the mark that is printed in colors in this advertisement, the same then as now?

A. Are you pinning me down to exact proportions?

X Q. 243. I want to know if the advertisement was in the shape which is here and which resembles the shape on "Complainant's Exhibit, No. 1, Placard" and does not have the same proportions as the label on "Complainant's Exhibit, Complainant's Box." In other words, the black band in this advertisement does not go into the right angle of the figure?

A. I am not going to try to be sure of that from my memory but I can refer to the September or October edition of the *Haberdasher* of that year. I do not know which it is. I think it is October. I think we have one as far back as October.

X Q. 244. Would you refer to that and produce it?

A. Yes, we have it here.

X Q. 245. Will you let me see it?

A. Yes, sir.

(Witness refers to *Haberdasher* of October, 1907. Defendant's counsel offers this *Haberdasher* in evidence and asks the notary to mark the same "Defendants' Exhibit A.")

(Complainant's counsel objects to the offer of any of complainant's material as exhibits in evidence by defendants' counsel, as being improper. If defendants' counsel wishes them marked for identification, there is no objection.)

178 X Q. 246. This is the *Haberdasher* of October, 1907, Volume 46, No. 4, published by Joseph W. Gibson, 19 Union Square and at page 20c there appears in the upper half your advertisement?

A. Yes, sir.

X Q. 247. That advertisement shows a cut in colors which resembles the ends on "Complainant's Exhibit No. 1, Placard," does it not?

A. I should put it a little stronger than resembles. I think it is practically the same except for the ruling around it.

X Q. 248. And except for the size?

A. Yes, of course, the size is not the same.

X Q. 249. Otherwise it is identical?

A. Yes, outside of the "Reg. U. S. Pat. Off." not being there.

X Q. 250. I have noted the black band contains, in white letters, the name Notaseme and in the flourish underneath the words "Trade-Mark." As a matter of fact you did not have a United States trade-mark at that time, did you?

A. No, we did not.

X Q. 251. And you did not have a trade-mark for that name did you?

A. We did not intend it as a trade-mark for that name.

X Q. 252. You did not?

A. No.

X Q. 253. For what did you intend the words "Trade-Mark" which are printed in black on the white flourish under the name "Notaseme?"

A. The whole design.

X Q. 254. You intended the whole design?

A. Yes.

X Q. 255. In subsequent goods you printed the identical label with the name "Trade-Mark" on the white flourish and underneath in small letters "Reg. U. S. Pat. Off." meaning thereby that it was registered in the United States Patent Office as a trade-mark, did you not?

179 A. Yes.

X Q. 256. To what did you wish either of these trade-mark notices to refer?

A. They both referred to the same thing. They both referred to the trade-mark design.

X Q. 257. And you at no time intended the word "Notaseme" to form a portion of that?

A. No.

X Q. 258. You had no intention of conveying the idea that the word "Notaseme" was a portion of the trade-mark, if I understand you correctly?

A. No, we had our design and submitted it to become registered and we registered the design.

X Q. 259. I am not asking you what you submitted to be registered, Mr. Newman. I am asking prior to the time that your trade-mark was registered, when you were doing business as the Milander-Newman Company and when in your advertisement there appeared the word "Trade-Mark" in the black letters on the white flourish underneath the word "Notaseme." To what did you intend that word "Trade-Mark" to refer?

A. The whole thing.

X Q. 260. The whole thing, including the word Notaseme?

A. The whole thing, as you read it over.

X Q. 261. That is the red panels free and the black band with the word Notaseme inscribed on it in conspicuous letters?

A. Yes.

X Q. 262. There is no doubt about that, is there?

A. No.

X Q. 263. And you placed the word "Trade-Mark" on the flourish of Notaseme as a conspicuous place for that term, did you not?

A. No, not for the term at all. We wanted to put the word "Trade-Mark" on that design and thought it about the best place
180 to put it. I think the printer put it there. I do not think we had much to say about where it was going. We did not care, just stuck it in.

X Q. 264. And you put it in there although it had not been registered as a trade-mark?

A. Yes.

X Q. 265. Now, when your trade-mark was registered, you considered the registration of some importance, did you not?

A. Yes.

X Q. 266. Why did you not then put your notice of registration on the mark itself?

A. On what mark?

X Q. 267. On the figure which you had trade-marked.

A. I do not know. No particular reason. We just did not.

X Q. 268. You did not remove the word "Trade-Mark" from the flourish of the word Notaseme where you had originally placed it?

A. No, there was no occasion. We did not care where it was so it was the figure. It was the figure we had registered.

X Q. 269. Mr. Newman, would not that word "Trade-Mark" placed on the flourish of the word Notaseme, written across on the black band, convey the idea and was it not intended at the time to convey the idea that the whole figure including the word Notaseme, was the subject of a trade-mark?

A. No, not necessarily.

X Q. 270. I do not want to know whether it was necessary or not, but I want to know whether that was your intention at the time?

A. No, it was not.

X Q. 271. You are clear in your recollection that the word "Trade-Mark" printed where it was, was not intended to cover the word Notaseme as a portion of the trade-mark?

181 A. No, I do not believe it was. Not the word Notaseme. It was intended simply to cover the effect of the whole thing. The design,—the effect to the eye more than anything else.

X Q. 272. At that time in the very beginning of your career, as a member of the firm of Milander-Newman Company, you had devoted some considerable time to devising a catchy name for your wares, had you not?

A. I do not think we had devoted any considerable time, no.

X Q. 273. You had devoted some thought to it?

A. Yes.

X Q. 274. Did you think the word Notaseme was a lucky inspiration?

A. If the fact that it was a satisfactory name for us and we did not have to think any further about the subject was a lucky thing, yes.

X Q. 275. Did you not consider it a very catchy, suitable name for the goods that you purposed manufacturing?

A. We were not particularly swelled up over it, we just thought it a good name.

X Q. 276. You did not think it was a particularly striking name?

A. No, not especially so. It was a name, that is all.

X Q. 277. And you thought that was a very good name?

A. We have not made any great feature of that name, not to any great extent. You will find in a great part of our advertising the name is not so awfully conspicuous. In all cases you will find the design is the most conspicuous thing. That is what catches the eye.

X Q. 278. That might be a question of opinion?

A. Yes, it might.

X Q. 279. To the untutored mind, like myself, the word Notaseme might seem rather attractive for a stocking, might it not?

182 A. I really do not know what to answer to that.

X Q. 280. In your first advertisement I see you have a special reference to the fact that the goods are positively without seams?

A. Yes, one of the things we say about them. We say many things in that advertisement.

X Q. 281. You have four chapters here indicative of the superiority of your goods, as I take it?

A. Yes.

X Q. 282. The first one on the left hand side headed in very black letters, is "Comfort" and the very first statement under that in capital letters is "Positively Without Seams"?

A. Yes.

X Q. 283. So you considered that of some importance to call that to the attention of the trade?

A. We consider it of very little importance and we have since learned a whole lot more about advertising. Now we do not consider it of any importance.

X Q. 284. Now you do not consider it of the slightest importance?

A. Not the slightest.

X Q. 285. But you still have to call the goods Notaseme goods, do you not?

A. Yes.

X Q. 286. I also notice that on that advertisement the heading of it in the largest type is the word "Not-a-Seme" quoted in red quotation marks?

A. Yes.

X Q. 287. You considered that important at that time?

A. Yes, we did that and we still do that so that people will know how to pronounce it, as there are many people who are unable to pronounce our name. We know of a great many cases where people call our goods Not-semé and No-tas-me. We have had all

sorts of variations from the correct pronunciation of our name which proves that they do not think anything about what
183 the name implies at all. They know the goods and know how they are labelled and know the trade-mark and the name does not seem to imply very much to them.

X Q. 288. You say that those are actual occurrences and for that reason you continue to separate the words?

A. In some cases, yes.

X Q. 289. Did you find the reasons you have given very powerful reasons in October, 1907?

A. Yes, as powerful as we do now.

X Q. 290. I understood you to say you first put your goods out in 1907?

A. What would that have to do with it?

X Q. 291. At that time there was not very much of them?

A. Yes, proportionately there was. We knew a great many people and a great many people knew we had gone into business. From the very first they made mistakes. Before we commenced the advertising, people would make the mistake when we would tell them what our trade-mark was going to be.

X Q. 292. So that in the very first in advertising you found it convenient, or rather expedient to avoid mistakes by separating the name into what was really its component parts?

A. Not in the trade-mark proper. It was found best to have people clear on the pronunciation of the word.

X Q. 293. And I presume that the same reason would continue if it started so early, until the present time?

A. We still do it, yes, because people still make the same mistake.

By Mr. WISE: I offer in evidence, page 15 of the Haberdasher publication of January, 1911, and ask the notary to mark the same "Defendant's Exhibit B."

184 (Complainant's counsel objects to the offering of any of complainant's material or exhibits in evidence by defendant's counsel, as improper. If defendant's counsel wishes them marked for identification there is no objection.)

X Q. 294. On that advertisement, which is the most recent one, I presume, is there any such division of the name?

A. No, there is not. There does not happen to be on this one, but I think you will find a lot of previous editions all through last year that they have. We do not always put it on there. In the shape this advertisement is in it would be out of place, in the first place. This is supposed to imitate a letter, this particular advertisement, and there would be no room, but you will find that same special division of the words, so that people will get the pronunciation straight, on some of our other advertising stuff, such as placards, etc.

(Mr. Wise shows witness "Com. Ex. No. 1, Placard.")

X Q. 295. Is that a street car sign?

A. Yes, sir.

X Q. 296. Is that a street car sign that you use in Philadelphia?

A. New York City.

X Q. 297. Do you use any other kind of street car signs?

A. Yes.

X Q. 298. Have you produced any of them here in those in evidence?

A. I do not think we have any more down here.

X Q. 299. You have others of different design?

A. Yes, we have some others. I think we have some other designs up to the factory. Cards of other designs.

X Q. 300. Have you any recollection of how many different street car designs you have?

185 A. How many?

X Q. 301. Yes.

A. No.

X Q. 302. Do you remember when you adopted this one?

A. Can't tell you exactly. We have perhaps had ten different designs for street car signs but in all cases they have had the same trade-mark design. There has only been a difference of the wording and the registration. We have had a good many with nothing but printed matter and the polygonal design.

X Q. 303. Could you produce any of those?

A. Could I produce any? I think so, yes. If I can find any I will.

X Q. 304. In this exhibit "Complainant's Exhibit No. 1, Placard," which you have designated as a street car design, you say, "All colors at Haberdashers, manufactured by Notaseme Hosiery Company, Philadelphia, Pa." This sign you say was in New York cars?

A. Yes, sir.

X Q. 305. You did not there advertise the names of the parties dealing in the socks,—the retailers?

A. No, nor at any other time.

X Q. 306. You never have?

A. No.

X Q. 307. These placards that are produced by your counsel are street car placards?

A. Yes.

X Q. 308. Can you fix the time when you respectively adopted these?

A. No, I cannot. Really I cannot do so.

X Q. 309. They were all adopted some time after your trade-mark was registered, because they bear the registered notice?

A. Yes.

X Q. 310. Prior to that time did you advertise in street cars?

186 A. No, we did not advertise in street cars prior to that time.

X Q. 311. Your trade-mark bears the registration date of May 4, 1909.

A. I think I can clear the whole matter up by telling you we started advertising in New York street cars in April, 1910.

X Q. 312. That is the advertisement placards here which have been produced are all for the purpose of New York street cars?

A. Yes.

X Q. 313. No other street cars?

A. No.

X Q. 314. What form of advertisement other than the Haberdasher advertisement and the distribution of show cards for show cases, did you adopt prior to the registration of your trade-mark?

A. We distributed those little match booklets as in one of the exhibits here, same as Exhibit No. 6.

X Q. 315. Where did you distribute those?

A. New York City.

X Q. 316. How did you distribute them?

A. By sending them to our customers who purchased our goods. That is they really distributed them to the consumers.

X Q. 317. That is you provided your customers in New York City with these little papers of matches for the purpose of having them distributed to retail purchasers?

A. Exactly.

X Q. 318. Did you adopt that method of advertising anywhere else than in New York?

A. Yes.

X Q. 319. Where?

A. Everywhere that we shipped our goods.

X Q. 320. That is you did not limit your advertising with these matches to New York City?

187 A. We did not. We also distributed small calendars the same way.

X Q. 321. Barring the advertisement in the Haberdasher did you advertise in other forms prior to the registration of your trade-mark?

A. Did we advertise, you mean, in a publication?

X Q. 322. Yes.

A. No, we did not, but we certainly had displayed a whole lot of our goods in New York in various places.

X Q. 323. I move to strike out the answer. I am referring now only to publication in some magazine, daily, weekly or monthly paper.

A. No, we have not done a great deal of advertising in publications whatsoever. In fact a very small amount, comparatively speaking. Most of the money we have spent on advertising has been on display work. Of course there are different ways of advertising the goods. Some people spend all their money on publication work and we have stuck more to the getting up of conspicuous and attractive displays, placards, show signs, labels and all that sort of advertising stuff that makes the goods effective and attracts the eye to them.

X Q. 324. But since the registration of your trade-mark you have adopted a broader field of advertisement, have you not?

A. We are continually increasing our advertising proportions and intend to do so as long as our business increases.

X Q. 325. I am not questioning the amount that you spend but the character of the advertisement for which you spend it?

A. Necessarily we enter into new fields. We take up new ideas all the time.

X Q. 326. Do you still confine your advertisements to show cards and articles that are distributed amongst your customers to be distributed by them? or do you go into the broader field of newspapers and magazine advertisements?

188 A. No, we have not gone into any newspaper and magazine work that I could mention worth while for the same reason as I told you before. We try to make the effect produced by our design and find this very difficult to do and in fact impossible to do it in newspapers and most magazines except those that will allow us to reproduce colors.

X Q. 327. Have you had any advertisements at any time either before or since the registration of your trade-mark, either in newspapers, magazines or any placards for further advertisements where your colors did not appear?

A. Not that I know of.

X Q. 328. Well, who would know about that?

A. The only way it might have been done and I believe it has been done, is by a customer of ours, without our authority, requesting electroes from us and he had simply put the advertisement in without any colors.

X Q. 329. Do you know that that has been done?

A. No, I do not know that that has happened.

X Q. 330. You say you believe it has been done?

A. Yes.

X Q. 331. Can you tell me by whom that has been done, if you recollect?

A. I cannot. I have a vague recollection of an advertisement of that kind appearing on some occasion. We have discouraged that sort of thing and we do not send our trade electroes on that account. We have refused to send out our electroes because we do not want them reproduced that way.

X Q. 332. Can you state whether the occurrence to which you refer happened within the last year?

A. I cannot.

X Q. 333. You have no recollection of any specific event?

A. Not at all.

X Q. 334. You know it has occurred?

189 A. Yes, I have seen some such advertisement somewhere and I simply wanted to be exact in my answer to you, that is all.

X Q. 335. Did you take any steps to prevent the repetition of that particular advertisement that was called to your attention?

A. I do not think that the thing was ever repeated. I do not believe that there was ever any practice made of it at all.

X Q. 336. Returning to the period after you had started in busi-

ness, can you state, if you know, how much business you did in the first year that you were doing business in the name of Milander-Newman Company and generally speaking in what territory was the business done?

A. Yes, I can tell you approximately. We did a very small business the first year. I think about sixty thousand dollars, which I would call comparatively small. In New England, in New York, in the South, which of course would include Baltimore and Washington.

X Q. 337. Well, where was the largest proportion of your goods sold?

A. I should say the two territories out of which we got the most business were the South and New England.

X Q. 338. Now that carries us through until about the first of October, 1908, when you first started out putting your goods on the market?

A. Yes.

X Q. 339. Can you state how much you spent for advertising during that year?

A. I really could not say. I should say between three and five thousand dollars.

X Q. 340. And all that advertising was in the form of those show cards that you have exhibited in evidence?

A. Not all of it, no. A good part was in that and of course on our label work.

X Q. 341. Did you start in at this time on this placard work?

A. No, not at that time.

190 X Q. 342. You mean the labels on your boxes, the bands and tickets?

A. Of course they are done for advertising purposes solely.

X Q. 343. That expense of three to five thousand dollars included then exclusively your box work and labels?

A. Yes. You see, as you will notice, our labels, box and bands and all that sort of stuff are of a very high grade. They cost us a whole lot of money. We have made them so entirely for advertising purposes so as to produce the effect that we wished in the best possible manner.

X Q. 344. Your expense for advertising included all these folding tickets and labels that were used on the goods inside of the box and the label that was used on the outside of the box?

A. Yes. It was just as much advertising as placards, signs, etc. We had also these large signs showing the design.

X Q. 345. Have you any of those in evidence?

A. No, I have not.

X Q. 346. And they were in substantially the same form as the advertisements that you produce now with the exception that you did not have on them Reg. U. S. Pat. Off.?

A. Yes.

X Q. 347. And the cards and placards other than those attached to the box or the labels in the box were substantially, in so far as

your mark was concerned, in the same shape as Complainant's Exhibit, No. 1, Placard?

A. Yes, as regards our trade-mark design, they were.

X Q. 348. That is they were not the square that appears upon the label but the long rectangular figure standing on end?

A. I am not so sure of that. I do not know whether they were squares or rectangles.

191 X Q. 349. Did you change your letter head since that time?

A. Have we changed our letter head since that time?

X Q. 350. In so far as the mark was concerned?

A. Yes, we have changed it a bit.

X Q. 351. In what respect?

A. I think in the proportion and in the ruling which has been slightly varied.

X Q. 352. How do you mean in the proportion?

A. I mean the proportion of the figure. I do not think our early stationery, the proportion of the same, was exactly the same as it is now. I think it has been made a little narrower. There is a slight variation of some kind there. I have never even taken the trouble to notice it.

X Q. 353. Now in the second year, that covers from October, 1908, to October, 1909, you did about how much business?

A. Between one hundred and fifty and one hundred and seventy-five thousand dollars worth or somewhere around there.

X Q. 354. You increased your business three-fold over the first year?

A. Yes.

X Q. 355. Did you adopt any other means of advertising than you had in the first year?

A. We carried on about the same ideas in our advertising.

X Q. 356. You did not advertise in papers any more than you do now?

A. No.

X Q. 357. Where was that trade distributed? I mean so far as territory is concerned.

A. Our proportion of business of course grew in the territories that we have been working the previous year and we opened up some new territories. I do not know now in just what order they were opened up. I think we increased our business in New
192 York City and we also increased our business here in Philadelphia and Baltimore and Washington. I think we opened up some territory in the West, Ohio, Illinois, around that section.

X Q. 358. Did you open your branch in Chicago during that period?

A. No, sir.

X Q. 359. That has been a later period?

A. Yes.

X Q. 360. Did your sales of goods in the territories you have described increase in about the same average proportion throughout that period?

A. I do not know. I really cannot answer that question very intelligently. It would be a guess on my part.

X Q. 361. You simply have total results in your mind?

A. That is what we are looking for.

X Q. 362. During that year you changed the name of your corporation, did you not?

A. Yes.

X Q. 363. From the Milander-Newman Co. to the Notaseme Company?

A. Notaseme Hosiery Company.

X Q. 364. Why did you do that?

A. The real reason is because we took in a third party and the names Milander and Newman together were long enough and if one more name were to go to that it would have made an impossible name. That was the real reason.

X Q. 365. Was it necessary to have the third name?

A. It was not necessary but we did not want to offend the third man.

X Q. 366. You were in business for a year and a half prior to that time and had been progressive and prosperous, your corporation name had been of no injury to you, had it?

A. It certainly had been no injury to us whatsoever.

X Q. 367. When this new partner or associate became
193 interested with you did he request that his name be added to the same?

By Mr. BARR: Objected to as immaterial and irrelevant, and as apparently an attempt to pry into the private affairs of the complainant.

A. I believe he did.

X Q. 368. And you thought the name too long so you determined upon some other name?

A. Yes.

X Q. 369. And you adopted the Notaseme Hosiery Company by mutual consent, eliminating the names?

A. Yes, eliminating all names.

X Q. 370. Do you remember when application was made for the registration of your trade-mark?

A. Application I think was made in 1907 sometime.

X Q. 371. Did you make the application, that you remember?

A. How do you mean, personally?

X Q. 372. Yes.

A. No, I do not recall making personal application for it. I gave instructions to apply for it.

X Q. 373. Mr. Milander apparently signed the declaration for it?

A. That was because, I believe, he was president of the concern at the time. I do not know why it was.

X Q. 374. You of course saw the application?

A. Yes, I think I looked it over when we got it.

X Q. 375. I show you Complainant's Exhibit, Trade-Mark in

suit which shows the drawing of a square with the black band running diagonally from the upper left hand corner to the lower right hand corner and ask you whether you remember whether that drawing was the one that was submitted with your application in December, 1907

194 A. I certainly do not remember that. I do not believe any drawing was submitted at all. I think some of our printed stuff was submitted. I do not know what the drawing was made from but I believe it was stuff that we had already had printed. There was no sketch or anything of that sort.

X Q. 376. Did you ever have a mark printed in the shape and form that is given there on that trade-mark paper?

A. Did we ever have a mark?

X Q. 377. I mean in that identical form and shape as it appears there?

A. Well, I should say that the band that we have been using is exactly the same.

X Q. 378. Leaving exhibits aside, I am talking now of this outside of colors and did you ever use for advertisement or for any purpose a square such as shown there without any writing on it of any kind?

A. No, we did not.

X Q. 379. So that the trade-mark diagram does not present any figure that is ever, in fact, used by you without other marks added thereto?

A. No, it does not. We simply use this design with the changes inside of it.

X Q. 380. What do you put inside of it as was originally in?

A. Inside where?

X Q. 381. On the band.

A. On the black diagonal band?

X Q. 382. Yes.

A. We usually put the word Notaseme in there.

X Q. 383. Is it not a fact, that you have never used that design in any other way except in conjunction with the word Notaseme printed in script across the black diagonal band with the word trade-mark printed in the flourish?

A. It is a fact.

195 X Q. 384. Is it not a fact that that word Notaseme written in large script letters is always in white across the black band?

A. It is a fact.

X Q. 385. When you said that no doubt one of your labels or other advertising matter had been forwarded to Washington for registration at the Patent Office as a trademark, it is evident then that the square shown on the trade-mark proper was not taken from such a label of yours?

A. Why?

X Q. 386. Because that name does not appear on there.

A. The name was not registered.

X Q. 387. I know the name was not registered. What I want to know is whether the drawing which you originally submitted with

your application for a trade-mark is properly reproduced in the trade-mark paper that is in evidence?

By Mr. BARR: Objected to for the reason the witness has not qualified as an expert in Patent Office or trade-mark procedure.

A. I really could not answer it. I think the attorneys who applied for registration can clear that up for you.

X Q. 388. Who were those attorneys?

A. Wiedersheim & Fairbanks.

X Q. 389. In whose office we are now conducting this examination?

A. Yes.

X Q. 390. I call to your attention a statement signed by the Milander-Newman Company by A. M. Milander, President, which says that the Milander-Newman Company has adopted for its use the trade-mark shown in the accompanying drawing. Now have you any recollection of that accompanying drawing?

A. None whatsoever.

X Q. 391. Do you know whether that application for a trade-mark was accepted or rejected?

196 A. I do not remember.

X Q. 392. You know nothing about it?

A. No, that was put into the hands of the attorneys and it simply rested there until we finally got our trade-mark.

X Q. 392a. You know that quite a considerable time intervened, do you not, between the application and the registration?

A. Yes, sir, more than we wished.

X Q. 393. That the application was filed sometime in the latter part of the year 1907 and that the registration did not take place until May 4, 1909?

A. Yes, I do know that.

X Q. 394. Do you know or were you informed what the reasons were for that delay?

A. I think there was something said to us at one time when we inquired about what was delaying us getting the registration. We were simply informed that there was some hitch of some kind.

X Q. 395. Nothing other than that?

A. That is all I remember about it.

X Q. 396. Don't you know as a matter of fact, Mr. Newman, that the first application and the first drawing that was submitted to the Patent Office contained the name Notaseme written in white letters across the black band of the square?

A. Perhaps it did. I am not positive about that.

X Q. 397. Do you not know as a matter of fact?

A. We did not pay very much attention to that thing. We simply submitted it to this office here for registration and we were so busy selling goods and making a living that we did not bother much about the rest of it.

X Q. 398. Didn't you think the trade-mark was an important matter?

A. Yes, but we knew it was in good hands.

X Q. 399. You were satisfied to have it rest in good hands without further inquiry?

A. I think we called our attorneys up once or twice on 197 the phone and asked about when we would get the registration.

X Q. 400. Were you informed that the department had rejected your application for a trade-mark on the ground that the drawing accompanying the application contained the word Notaseme which was not in the opinion of the department a name or word which could be trade-marked?

A. I think some such thing was mentioned to us.

Adjourned for luncheon.

After Luncheon.

X Q. 401. Well, the original application which was made by your direction contemplated the inclusion of the word Notaseme in your trade-mark, did it not?

A. I do not remember a thing about that. I can't tell you whether it did or not. I rather think it did, however.

X Q. 402. I hand you a paper and ask you whether you recognize that as a copy of the original drawing which accompanied your original application?

A. I cannot identify that as such as that matter was entirely in the hands of our attorneys to attend to. They got up the drawing and attended to the whole matter. We did not go into any details regarding the whole affair. We simply turned it all over to them and they attended to it.

X Q. 403. Your attorneys, being as you state, Wiedersheim & Fairbanks, in whose office we are taking the examination?

A. Yes.

By Mr. WISE: Mr. Barr, will you produce the original drawing accompanying the registration?

198 By Mr. BARR: The application in question does not form a part of the direct deposition and any questions relating thereto are improper cross-examination in view of the fact that this is immaterial and irrelevant.

(Counsel for complainant states that he has no knowledge of this drawing being in this office, but if the records are here there is no objection to counsel for defendant looking them over.)

By Mr. WISE: Counsel produces original papers without waiving any objections to the evidence hereinbefore stated. Counsel for complainant offers for inspection a file of papers containing originals or copies of correspondence with the department together with applications for the trade-mark and the amendments from time to time offered thereto. Such file wrappers contains neither the original nor the copy of any drawing annexed to the original application or any amendments thereof. I ask the stenographer to mark for identification the pencil copy of a drawing which bears the inscription above the drawing, "Cancelled Dec. 19, 1908," and in the lower

right hand corner, "Proprietor, The Milander-Newman Company by Wiedersheim & Fairbanks, attorneys," in the lower left hand corner, witnesses, "P. F. Nagle, L. Douville."

X Q. 404. You stated, Mr. Newman, that you had no recollection of any such drawing as this that I have marked for identification? I mean in connection with the application.

A. I believe I remember that there was a drawing of some kind.

X Q. 405. Was it a drawing substantially like this?

A. I think it was substantially like that.

X Q. 406. Do you know of your own knowledge or by information received from your attorneys, whether a year after the
199 application was first made and about December, 1908, another drawing was submitted to the department as a substitute for the one, a copy of which I have just shown you or which purports to be a copy?

A. No, I do not know positively about that. I recollect something of the sort being taken up. As I stated before we did not attend to that any ourselves, it was simply in the hands of the attorneys and they went right along and carried it on until the very end, until we got the registration.

By Mr. WISE: I offer for identification a drawing resembling the previous one in a general way, excepting that on the diagonal band there is no printing or writing of any kind, in the upper left hand corner of which is written "Substitute Drawing Dec. 19, 1908," Within the design is written "Cancelled Jan. 15, 1909;" in the lower right hand corner "Proprietor The Milander-Newman Company by Wiedersheim & Fairbanks, Attorneys;" in the lower left hand corner "Witnesses: P. F. Nagle, H. G. Dieterich."

(Complainant's counsel objects to the proffering of either of these drawings, as the drawings themselves are the best evidence and as these are not properly proved.)

X Q. 407. Mr. Newman, have you any recollection of having seen the drawing of which this purports to be a copy?

A. No distinct recollection, just at present.

X Q. 408. Do you know whether or not a third drawing was made?

A. I do not.

X Q. 409. Have you any recollection of any kind as to when the drawing attached to the trade-mark "Complainant's Exhibit, Trade-Mark in Suit" was first made?

A. I have not any recollection at the present time.

200 X Q. 410. Do you remember whether you were informed about that by your attorneys?

A. I do not remember, now.

X. Q. 411. You notice in that drawing attached to the trade-mark "Complainant's Exhibit, Trade-Mark in Suit" that the upper and lower panels are triangles and inclosed in lines and that there is apparently a space between the triangles and between the diagonal band across the figure?

A. Yes, I noticed that.

X Q. 412. Did you ever, as a matter of fact, use that identical cut in your business with spaces showing between the panels and the diagonal band?

A. Yes, I think a good many of reproductions of our trademark have similar rulings. As I previously stated the rulings were slightly changed by the printers at different times and we attached absolutely no importance to that.

X Q. 413. Isn't that more than a mere matter of ruling?

A. I do not think so. I cannot see it from where I am sitting. I have to take it up and look at it closely.

X Q. 414. Is that such a ruling as the printer would change, who printed for you?

A. Yes.

X Q. 415. Is it?

A. Yes, they have done so.

X Q. 416. Is there any one of the exhibits in evidence here which contains that ruling?

A. I think so. I think some have the ruling and some have not. In this one here there is a white ruling around it.

X Q. 417. Around the whole mark?

A. Yes.

X Q. 418. I am referring to the inside fields.

A. There is one with and one without.

X Q. 419. Referring to "Complainant's Exhibit, Complainant's Box" the band has a ruling and the folding ticket has none.
201 The ruling that you refer to is the gold stripe which marks the edges of the black band?

A. Yes.

X Q. 420. Have you any other exhibits in mind where that same ruling is shown?

A. I do not know. There may be some there.

X Q. 421. "Complainant's Exhibit, No. 5, Announcement Card" has the same ruling, in a white space between the red field and the black diagonal band?

A. Yes.

X Q. 422. All the others have no such feature, have they?

A. I do not know whether they have or not.

X Q. 423. Would you mind looking at them?

A. No, none that you show me have.

(Mr. Wise shows witness Complainant's Exhibit, No. 4, Window Card; Complainant's Exhibit, No. 3, Envelope; Complainant's Exhibit, No. 6, Match Booklet; Complainant's Exhibit, No. 1, Placard; Complainant's Exhibit, No. 2, Letter Head.)

X Q. 424. Were you informed that your application for trademark had been rejected?

A. I think some such thing was mentioned to us.

X Q. 425. Were you informed of the reason for the rejection?

A. I think we were. I think we were told the reason.

X Q. 426. Will you state what you were informed was the reason?

A. I do not know exactly but I think we were told, upon inquiry, that we could not get the design registered if we had the word Notaseme in the drawing, or something of that sort, and since it was the design only that we wanted to have registered, there was no objection to leaving it out.

202 X Q. 427. Were you informed that the word Notaseme was the distinguishing feature of the mark and being merely a misspelled descriptive term, indicating that the hosiery was made without seams and not a fanciful term indicative of origin, it was refused as a trade-mark?

A. I do not remember all that.

X Q. 428. You were informed of the substance of it?

A. Well, as I said before, we were simply informed that we could not register the design with the word Notaseme appearing in the band. That is the way I remember it. We had no objection to leaving it out, since we wanted the design registered.

X Q. 429. So you forwarded a copy of the design with the name Notaseme left out?

A. Yes, our attorneys did.

X Q. 430. I presume it was done with your sanction and approval?

A. Yes.

X Q. 431. And thereupon there was forwarded a design with the name Notaseme left off?

A. I suppose there was.

X Q. 432. But you continued to use the design with the name Notaseme attached or rather written across the black band, without interruption.

A. Of course we did, the same as anybody else would use a design with their firm name in it or over it or under it.

X Q. 433. At the time that this application was rejected by the department because it contained the name Notaseme, your corporate name was Milander-Newman Company?

A. Yes, it was.

X Q. 434. And it continued as Milander-Newman Company until sometime in the year 1909?

A. Yes.

X Q. 435. And that covered the whole period during which you had made application for a trade-mark and the time when the trade-mark was actually registered?

203 A. I believe it did, yes.

X Q. 437. There is no question in your mind about that? The trade-mark application, according to printed terms, was filed on December 14, 1907, and the application was registered on May 4, 1909?

A. Yes, since you give me those dates, my answer is yes.

X Q. 438. Immediately after the registration of the trade-mark you reorganized your corporation, did you not?

A. About the same time, yes.

X Q. 439. And at what time did your corporation name change from Milander-Newman Company to Notaseme Hosiery Company?

A. When the Notaseme Hosiery Company bought out the Milander-Newman Company.

X Q. 440. Was that the date of the assignment?

A. I think the date is somewhere in there.

X Q. 441. Was that the date of the assignment?

A. Yes, I believe it was.

X Q. 442. And that assignment is "Complainant's Exhibit, Assignment" and purports to be dated the 8th day of May, 1909, signed by The Milander-Newman Company by A. M. Milander, President?

A. Yes.

X Q. 443. And attested by A. W. Newman, Secretary?

A. Yes, sir.

X Q. 444. And acknowledged the same day before a Notary Public?

A. I believe so, yes.

X Q. 445. In the City of Philadelphia?

A. Yes.

X Q. 446. And only from that time on the name Notaseme represented the name of the manufacturer of the hosiery to which the labels were attached?

A. It represented the name of the goods just as much before as it did after.

X Q. 447. That was the name by which the goods were known and that was the name that you subsequently adopted for the company?

A. That was the name by which we called our goods.

X Q. 448. And that name you did not want to change? There was no occasion for changing it?

A. No there was no occasion for changing it.

X Q. 449. But you changed the name of your corporation?

A. Yes.

X Q. 450. So as to include the name of your goods?

A. Not for that particular purpose.

X Q. 451. Well it may not have been the purpose but the effect was there, was it not?

A. My answer "Not for that particular purpose" I should think would cover that.

X Q. 452. The result is the same whether the purpose was there to do that or not, I suppose?

A. Yes.

X Q. 453. Now subsequent to that period that the reorganized corporation took over the assets of the Milander-Newman Company and did business under the name of the Notaseme Hosiery Company, you continued to print your advertisements, labels and cards in the same way?

A. Yes.

X Q. 454. There was no change in that whatever?

A. No.

X Q. 455. Excepting of course where, as in the case of the adver-

tisement in the Haberdasher, you substituted the new name for Milander-Newman Company?

A. Yes.

X Q. 456. But in the figures themselves and in the use of the trade-mark other than that there was no change?

A. No there never had been.

X Q. 457. Now, therefore, you continued the former business, did you not, after May, 1909?

205 A. Of the Milander-Newman Company, yes.

X Q. 458. It was virtually a continuation of the previous business?

A. Yes.

X Q. 459. And you have described the course of that business, its volume and the period up until October, 1909, some odd five months later than this organization. Now from October, 1909, until October, 1910, how much business approximately, did you do?

A. About two hundred and fifty thousand dollars' worth.

X Q. 460. And that was carried on in the same way as the former business?

A. Yes.

X Q. 461. You added new fields, I suppose, from time to time—opened up new territory?

A. Some few.

X Q. 462. Your business in New England, New York and the South increased in the same proportion about?

A. Yes.

X Q. 463. Your goods sold, as I figure it out, approximately eighteen cents a pair?

A. Wholesale, yes.

X Q. 464. You continued that figure as your price, as a general thing?

A. The majority of our goods are sold at a wholesale price of around eighteen cents.

X Q. 465. In various portions of the territories where you sell goods?

A. Yes, we had a fixed wholesale price that we did not vary from.

X Q. 466. Throughout all the period?

A. Yes.

X Q. 467. And you continue that now?

A. We still continue it.

206 X Q. 468. And during that period subsequent to the organization or reorganization of the corporation and beginning about April, 1910, you commenced to change or rather increase your methods of advertising? I understood you to say that you had adopted the placards in New York City in April, 1910?

A. We have gradually increased our advertising ever since we started with it.

X Q. 469. In cost?

A. Yes.

X Q. 470. As I understood you you only used display cards and similar devices which were sent by you to your customers for distri-

bution to their purchasers? Later on, at times, you had resorted to other advertising, such as display cards in cars. Well that is character and that part of your advertising began in April, 1910, as I understood you, or thereabouts?

A. Yes, about April, 1910.

X Q. 471. At that time you had not changed your means of advertising to any extent at all, except to increase in volume?

A. Yes. Our advertising in the *Haberdasher* has continued ever since we started in business in each monthly edition, and has varied in size, some months taking a full page, other months a half page. I do not remember just what.

X Q. 472. I am not referring to size but the kind of advertising you have adopted. Whether it was larger or smaller it would be of the same character.

A. That particular kind of advertising—the street car advertising, we started in April, 1910.

X Q. 473. Did you adopt that anywhere else than in New York?

A. No.

X Q. 474. Mr. Newman, did you know that your application for trade-mark had also been rejected for some other reason
207 that the name Notaseme being included in the drawing?

A. I do not remember anything of the sort.

X Q. 475. Were you informed at any time that a trade-mark somewhat similar had been granted to Jacob Miller Sons & Co. on July 3rd, 1894?

A. I certainly was not.

X Q. 476. That that mark was a band running diagonally across a rectangular field and was applied to goods of the same descriptive properties as your goods. You were not informed of that?

A. I was not.

X Q. 477. Do you know the firm of Jacob Miller & Sons Co. of Philadelphia?

A. I think I have heard of them.

X Q. 478. Did you know of other trade-marks ever having a similarity to yours?

A. I certainly did not.

X Q. 479. Did you ever see Dr. Warner's Coraline?

By Mr. BARR: Objected to as not germane to the direct deposition and further immaterial and irrelevant.

Question is withdrawn by Mr. Wise.

X Q. 480. Mr. Newman, do you know the defendant's place of business, R. H. Macy & Co.?

A. I certainly do.

X Q. 481. Large department store, is it not?

A. Yes.

X Q. 482. Situated in a prominent street in New York City?

A. Between Thirty-fourth and Thirty-fifth Streets on Broadway.

X Q. 483. And you know that they do a retail business only?

208 A. I do not know that positively but I presume that is all they do.

X Q. 484. Well, you know that department stores generally do a retail business, only?

A. Well, I guess there are some who also carry on a little jobbing business.

X Q. 485. Do you know of any who conduct a jobbing business in their department store?

A. Yes, I think I do. Not many.

X Q. 486. Would you mention any that conduct a jobbing business in a department store?

A. I just can't call them by name but I know some department stores who do in their stock room on the top floor, a little jobbing business with small concerns who want some stuff and they have some such customers.

X Q. 487. You do not know any special department store? Of course Marshall Fields do a large jobbing business and conduct a large department store. Do they, as far as you know, do any jobbing business in their department store?

A. No.

X Q. 488. They do it in their jobbing business if anywhere?

A. Yes.

X Q. 489. Well, you do not know that R. H. Macy & Co. do any jobbing business?

A. I do not.

X Q. 490. All you know is they sell at retail?

A. Yes.

X Q. 491. And they sell in that one store and you do not know that they have any agencies?

A. No, I do not.

X Q. 492. You have never seen any agencies of R. H. Macy's?

A. Yes, I have seen some. They have some depots down town where they take orders.

209 X Q. 493. Where they display goods?

A. I do not know whether they display goods or not. I do not believe they display goods but they take orders.

X Q. 494. You refer to the subway store or rather the terminal station where there is a space held by R. H. Macy & Co. for taking orders?

A. Yes, I refer to that, that is the only one I know of.

X Q. 495. You would not say that there — any other?

A. No, I have never seen any.

X Q. 496. Outside of that do you know of any place where Macy's do business in the sale of goods except under the roof of their building at Thirty-fourth Street?

A. No, I have no knowledge of any.

X Q. 497. You have never heard of any?

A. No.

X Q. 498. Do you know, of your own knowledge, when Macy's first sold the goods marked "Complainant's Exhibit, Defendants' Box" containing the label Irontex?

A. I do not know exactly what time they did but I am pretty sure about what time they did.

X Q. 499. What time do you think it was?

A. Some time in the Spring of 1908.

X Q. 500. And this exhibit, Complainant's Exhibit, Defendant's Box shows when open on the lower half of the box, a label with a red field and a black band running across it?

A. Shows it enclosed, too.

X Q. 501. Does it?

A. Yes.

X Q. 502. When it is closed is not the upper portion of the label somewhat disclosed?

A. Somewhat, but that particular box happens to be shallow and if the box were a little bit deeper the cover would not go over it and there are a great many goods put up in much deeper boxes than this where the label is free and prominent. Children's hose, 210 for instance, or ladies' hose, the boxes are deeper. This happens to be a box which contains thin hose and it is necessarily very shallow but it just depends upon the thickness of the goods.

X Q. 503. Depends upon how deep the boxes are?

A. Yes.

X Q. 504. Above that is a red label which contained "Macy's"?

A. I can't read it from here and it is right in front of me. I can just about make it out. I do not think it could be seen from a few feet off.

X Q. 505. It could not?

A. No.

X Q. 506. And you think that that red label of Macy's with the letters on it, which are approximately, for the large letters, one-half inch and for the small letters one-quarter of an inch in size, are not conspicuous?

A. No, I do not.

X Q. 507. You notice that the name Irontex is very conspicuously printed across the black band, do you not?

A. Yes.

X Q. 508. As conspicuously at least as the name Notaseme on yours?

A. Yes.

X Q. 509. Do you notice that the band runs in a different direction from yours, from the lower left hand to the upper right hand?

A. Yes.

X Q. 510. And you notice that there is printed matter in the red fields?

A. Yes, some very small printed matter.

X Q. 511. The labels that are around the goods are identical in design with that band, are they not?

A. No, they are not.

X Q. 512. In what respect different?

211 A. Their proportions are entirely different in each one. In other words they have varied the proportion of the red panel above and below.

X Q. 513. They have varied the proportions of the panel or they have changed the size of the figure, which?

A. Why, they have varied the proportions. They have changed the size of the figures but they have varied the proportions also. In the label the proportion of the black—the width—is greater than the greatest height of the red panels and in the band, the black diagonal strip is a good deal smaller than the base of the triangle and in these tickets, they call them stuffing tickets that are also included in the package, there is still another proportion. I do not know just exactly what it would figure out but the proportion is certainly different.

X Q. 514. In each one of them the black band runs from the lower left hand corner to the upper right hand corner?

A. Yes.

X Q. 515. And the black band is on each side of the corner which it touches?

A. Yes, in that regard I may say if you turn it around upside down, the diagonal band runs the other way. Now it runs the same as ours.

X Q. 516. If it is turned upside down. Naturally if you turned any rectangular figure upside down it would run the other way. Would it run in the same way as your band? Turn it in any way that you wish and see whether it does?

A. I believe I am wrong in that. Turn it this way, not upside down but sidewise and it runs from the left hand upper corner down to the lower right hand corner.

X Q. 517. That would show the writing standing on edge?

A. Yes.

X Q. 518. And on the boxes would the same thing appear?

212 A. If placed on edge. I do not make an issue of that. I simply mentioned it as a thing that I noticed, that is all. You made an issue of the difference in direction.

Cross-examination closed.

Adjourned until Friday, January 27, 1911.

PHILADELPHIA, PA.

By consent of counsel a further adjournment is had until Tuesday, January 31, 1911.

Present as before.

Before beginning the redirect examination of the witness, complainant's counsel, by consent, now makes due and timely objections to the following cross-questions and answers on the ground that the same are not germane to the direct deposition and for the further reason that they are irrelevant, immaterial and incompetent and have no bearing upon the issues herein, which are simply the

date of adoption and continuous use of the registered trade-mark here in suit and the infringement of the same by these defendants:

Cross-questions and answers Nos. 80, 81, 82, 83, 84, 87, 91, 92, 93, 94, 96, 97, 98, 99, 100, 101, 102, 103, 104, 125, 126, 127, 129, 135, 136, 137, 138, 139, 140, 144, 147, 218, 265, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 292, 293, 365, 366, 368, 388, 389, 392, 392, 392_a, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 410, 414, 415, 424, 425, 426, 427, 428, 429, 430, 431, 433, 474, 475, 476, 477, 478, 481, 482, 483, 484, 485, 486, 487, 488, 489, 497.

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PHILADELPHIA, PA., January 31, 1911.

Met pursuant to adjournment.

Present:

Robert M. Barr, Esq., for Complainant; Mr. Owen, for defendant and witness, Arthur W. Newman.

Redirect examination.

By Mr. BARR:

R. D. Q. 519. In your answer to X Q. 343, did you or did you not wish it to be understood that the advertising which you referred to as approximating three to five thousand dollars, included exclusively, box work and labels?

A. I did not wish it understood that it included exclusively box work and labels, because we had brought out other advertising matter, in the shape of show signs, placards, etc., as well as having advertised in *The Haberdasher*, a New York Trade Journal, throughout that whole period.

(Complainant's counsel offers in evidence placard and asks the examiner to mark the same "Complainant's Exhibit, Show Card.")

R. D. Q. 520. I now show you the object just offered in evidence and ask you to state what it is, Mr. Newman?

A. That is a show card or celluloid sign that we have distributed to the trade for use in displaying our goods during the period mentioned previously in which we had spent from three to five thousand dollars in advertising.

By Mr. OWEN: Introduction of this exhibit objected to on the ground that it is not properly introduced in the redirect examination, as it should have been introduced in the direct examination, if at all.

214 By Mr. BARR: The introduction of this exhibit is thought perfectly proper at this time, in view of the fact that defendant's counsel brought this advertising out on cross-examination and the same is introduced in view thereof.

R. D. Q. 521. When did you first use this placard just introduced in evidence, Mr. Newman?

A. I am not absolutely sure about the date when we first used

it. Sometime during the first six months of the business of Milander-Newman Company, our predecessors.

(Complainant's counsel offers in evidence page 20c of the Haberdasher magazine for October, 1907, Volume 46, No. 4 and in view of the size of this magazine, it is agreed by and between counsel that the Examiner marks only the page and is instructed to cut the same out before both counsel and mark it "Complainant's Exhibit, Haberdasher, October, 1907" also page 15 of the Haberdasher magazine for January, 1911, and mark the same "Complainant's Exhibit, Haberdasher, January, 1911.")

R. D. Q. 522. I now show you the two objects just offered in evidence, Mr. Newman, which objects have been referred to by defendants' counsel in X Q. 294 and 246 and ask you to state what they are?

A. One is a page from the October, 1907, edition of the Haberdasher New York Trades Journal, on which appears a half page advertisement of our goods and the other one is a page from the January, 1911, edition of the Haberdasher, on which appears a whole page ad. of our goods.

R. D. Q. 523. Will you please state whether or not you have, as a continuous act, advertised in this Haberdasher magazine?

A. Yes, we have had our advertisement in each and every monthly edition of the Haberdasher from October until the present time.

R. D. Q. 524. Mr. Newman, I call your attention to X 215 Qs. 502, 503 and 504 and ask you to state what knowledge you have as to how the defendants are dressing their goods at the present time?

A. I know that they are putting them up in boxes of various sizes and dimensions and on some of these boxes, especially those in which the goods are thick and the boxes deep, the label is entirely clear of the lid of the box and is also very much larger in height, therefore producing their design in a different proportion to where they use it on boxes that are shallow and where the lid comes down and hides the upper edge of this label.

(Complainant's counsel offers in evidence a box and contents and asks the Notary to mark the same "Complainant's Exhibit, Defendants' Box, No. 2.")

By Mr. OWEN: The introduction of this exhibit is objected to on the ground that the examination concerning the same is not proper redirect examination and that its introduction does not form a proper part of the redirect and that this exhibit, if offered at all, should have been offered on the direct examination.

R. D. Q. 525. Will you please look at the object just offered in evidence and state what it is?

A. That is a box containing children's Irontex hosiery, labelled and put up in the manner in which R. H. Macy & Company are showing and selling these Irontex goods.

(Defendant's counsel moves to strike out the portion of the answer which characterizes the manner in which the goods are put

up, as that exhibit speaks for itself as to the manner in which they are put up.)

216 (Complainant's counsel spreads the following letter on the record, the same having been marked "Complainant's Exhibit, Keefe Correspondence.")

July 19, 1910.

"Notaseme Hosiery Co.

"GENTLEMEN: "Enclosed herewith are two pairs of stockings (socks) bought at Macy's today. In purchasing these I went in and asked the clerk for Notaseme socks. The formula used on both occasions was as follows:

"I said 'I want a pair of Notaseme half-hose.'

"The girl said

" 'What size'

"I answered

" '10½'

"She then asked

" 'What color'

"I said

" 'Black'

"In purchasing the second pair I was accompanied by a friend who paid particular attention to every word I said. "I said 'I want a pair of Notaseme sox'

"She said

" 'What size'

"I said

" '10½'

"She asked

" 'Black?'

"The only difference in the conversation was that the second girl suggested the color. I had Mrs. Keefe go in with the box end and will write you this evening about it.

"Be careful to preserve these enclosures for the memoranda made on them were made at the time and are valuable because they may be used as exhibits.

217 "If I had more time I could prepare a more elaborate trap for them.

"Keep this letter as I may need it to refresh my memory should the case reach a trial.

"Yours truly,

"WM. KEEFE."

R. D. Q. 526. Will you please refer to the date of that letter, state what it is and whether or not "Complainant's Exhibit, Defendants' Box" was purchased before or after that date?

By Mr. OWEN: Question is objected to on the ground that the whole subject of this letter was covered on direct examination and that the question is not proper redirect examination and upon the further ground that it is immaterial, incompetent and irrelevant, it not appearing that witness knows when the defendant's box was purchased.

A. This is a letter received from Mr. Keefe dated July 19, which was of course three months after the purchase of the box that he made on April 12th, this box being "Complainant's Exhibit, Defendants' Box," and this letter which I now hold was to inform us and give us the details of the transaction of buying the hosiery that is contained in the envelope. "Complainant's Exhibit, Envelope Purchase."

By Mr. OWEN: Defendant's counsel moves to strike out that portion of the answer which purports to state the purpose for which the letter was written on the ground that the letter speaks for itself and that this purpose for which it was written can only be a conclusion of the witness.

R. D. Q. 527. Mr. Newman, you refer to date of April 12th? What year was this?

A. 1910.

Redirect examination closed.

218 Recross-examination by Mr. OWEN:

R. X Q. 528. This "Complainant's Exhibit, Show Card," which you testified was used by you during the first six months of your business when you were doing business as the Milander-Newman Company, is identical with the ones that were used then?

A. Yes, identical.

R. X Q. 529. And is this show card still used by you in this identical form?

A. No, we do not use these now. We have used them all up. We change them each time we order.

R. X Q. 530. This is one of the original which you have preserved since 1907?

A. Yes.

R. X Q. 531. You do not manufacture or use these at the present time then at all in this form?

A. No, not in that exact form. We had some slight changes made in them but practically the same sign has been used up until about a year ago, I think we used up the last of them.

R. X Q. 532. Referring to "Complainant's Exhibit, Haberdasher of 1907" and "Haberdasher of 1911" there is a difference isn't there between the figure which appears on these two advertisements?

A. You mean the design?

R. X Q. 533. I mean the entire figure.

A. Yes, there is a slight difference in ruling which I have spoken of previously and of course there is "Reg. U. S. Pat. Off." under the one of later date.

R. X Q. 534. Aside from any words which may appear within the figure or under the figure, there is still another very pronounced difference between the two figures?

A. I do not see it. I do not know what you refer to.

R. X Q. 535. The Haberdasher of 1911, has, has it not, a black band around the entire figure?

219 A. It has a black ruling around it. So has the other one, only the ruling is separated a little further away.

R. X Q. 536. Isn't it true that the figure on the Haberdasher of 1911 consists of a combination of red and black, whereas the figure on the Haberdasher of 1907 consists of a combination of red and black with a white border?

A. No, not all. The figure has the two red panels with the diagonal strip running between them and the ruling around this design does not effect it.

R. X Q. 537. Then in Haberdasher of 1907 you do not consider the white band which surrounds the figure and which is also surrounded by black line, to be a part of the figure?

A. Not necessarily. There is no white band at all that I can see. Simply a black ruling around it—sort of a dressing—and in the Haberdasher of 1911 this black ruling is brought closer or right up to the red. That is the only difference I can see.

R. X Q. 538. Do you consider the figure in the Haberdasher of 1907, that anything forms a part of the figure outside of the line whereby the red terminates?

A. Oh that is a matter that I really am not prepared to discuss.

R. X Q. 539. Did you design that figure?

A. Yes, I helped to.

R. X Q. 540. Well, was it your intention when you inserted this trade-mark that that applied to anything exterior of the line which bounds the red or did you intend it to include the line?

A. I do not think there was any instruction to put that ruling in. I think that was simply done by the printer as a sort of dressing around the whole thing.

R. X Q. 541. Then the figure as you designed it simply included the red and black?

220 A. I believe there was a ruling around the whole thing in the figure. I think there should be a ruling around it in all its reproductions. I have never bothered very much about just exactly where that ruling should be. It sometimes is brought up to the red and sometimes carried away a little bit. The effect of the trade-mark is absolutely the same.

R. X Q. 542. Then you did not regard this ruling as an essential part of the figure but simply as a dressing which might or might not appear thereon and whose position might be varied?

A. I am not prepared to go into any discussion of that. I simply know that the ruling is put there and we have never taken the trouble to insist upon it being put just in a certain way.

R. X Q. 543. Mr. Newman, you say you designed this figure and you certainly can tell whether it is your intention to have a ruling around it or not or whether it was your intention that the figure should include a ruling or should not?

A. Well, any figure must have a ruling to bound it. You cannot produce a figure very well without having a ruling around it and I believe the original figure had a black ruling around it.

R. X Q. 544. Like this one?

A. Something like it, if not exactly like it.

R. X Q. 545. And you cannot state whether the original drawing had a ruling like this or whether it was your intention that the figure should have this ruling around it?

A. Well I could tell by looking at the drawings for the application for trade-mark. They would tell me whether the intention was to have the ruling around it or not. I do not remember now whether they had or not. I could refer to this and tell you.

R. X Q. 546. Referring to the Haberdasher of 1911, the figure here has an entirely different band around it, has it not, from the figure in Haberdasher of 1907?

221 A. I do not see anything very different about it.

R. X Q. 547. You see here, don't you, that this figure has a black band around it whereas the figure in the Haberdasher of 1907 has a white band bounded by a black line?

A. No, I would not put it that way. I would say that the Haberdasher for 1907 has a black ruling around it separated by a small margin, whereas the black ruling on the 1911 edition is not separated by a white margin. Otherwise, the rulings are about the same with the exception that the January, 1911, Haberdasher is a little thicker.

By Mr. BARR: Complainant's counsel objects to questions relative to the ruling and the general arrangement of the design as immaterial and incompetent and furthermore as fully answered in the previous cross-examination.

R. X Q. 548. At the time this advertisement in the Haberdasher, 1907, was inserted, was that the style of figure or rather as you term it, the style of ruling that you universally used or was it sometimes the style appearing in Haberdasher of 1911?

(Same objection.)

A. I really cannot tell you now. We varied the style of ruling considerably. It depended entirely upon the use to which we applied this trade-mark.

R. X Q. 549. Can you tell when you first began to use the black border such as appears in the Haberdasher of 1911?

(Same objection.)

A. No I cannot. We not only used the black border but we also in several cases, used gold ruling around the design.

222 R. X Q. 550. Referring to "Complainant's Exhibit, Defendants' Box No. 2" did you ever see that before this morning?

(Complainant's counsel states that in order to save a large and voluminous record and a lot of questions which will probably be repeated, in view of the fact that the witness is to be recalled in view of the objections to the introduction of certain exhibits on re-direct examination and gives notice at this time that this is the intention in order that defendants' counsel may be so informed and also that a continued cross-examination relative to these exhibits is objected to for the above reason.)

A. No.

R. X Q. 551. And as a matter of fact you do not know whether this is one of R. H. Macy & Co.'s boxes which was sold by them or not, do you?

A. I know it about as well as I know my own name.

R. X Q. 552. You did not buy it there?

A. No, I did not make the purchase.

R. X Q. 553. You did not see it purchased?

A. No, but everybody knows it and it would be very hard to prove that that is not one of their boxes. They have thousands of dozens of all those goods on sale there.

(Defendants' counsel moves to strike out the answer on the ground that it is not responsive and on the further ground that it states a conclusion.)

R. X Q. 554. Then the only way that you know or pretend to know that this is one of defendant's boxes is because, as you say, everybody knows it?

A. No, I can prove that the purchase was made of this box in the store of R. H. Macy & Co.

223 R. X Q. 555. How would you prove that?

A. I have two proofs of it. I can produce, if required, the person who bought this box of hosiery and this box of hosiery also contains a sales slip, or the package no doubt does, which will prove his purchase at R. H. Macy & Co.

(Witness refers to box and does not find the sales slip.)

Recross-examination closed.

Deposition closed.

A. W. NEWMAN.

ARTHUR W. NEWMAN, a witness called on behalf of complainant, being recalled and having been duly sworn, deposes and says in response to interrogatories by Mr. Barr:

Q. 1. Mr. Newman, are you the same Arthur W. Newman who has heretofore testified in this case?

A. I am.

By Mr. OWEN: The recalling of the witness Newman is objected to on the ground that his examination has already been completed, recross-examination conducted, re-direct examination had and re-cross examination completed and upon the ground that this practice is improper and unnecessary. Defendant's counsel objects to any further examination of the witness.

(Complainant's counsel offers in evidence a show card and asks the Notary to mark the same "Complainant's Exhibit, Show Card.")

224 Q. 2. I now show you the object just offered in evidence and ask you to state what it is, Mr. Newman?

A. This is a show card or celluloid sign that we have distributed to the trade for use in displaying our goods during the period mentioned previously in which we had spent from three to five thousand dollars in advertising.

Q. 3. When did you first use this placard just introduced in evidence, Mr. Newman?

A. I am not absolutely sure about the date when we first used it. Sometime during the first six months of the business of Milander-Newman Company, our predecessors.

Q. 4. Mr. Newman, will you please state what knowledge you have as to how the defendants are dressing their goods at the present time?

A. I know that they are putting them up in boxes of various sizes and dimensions and on some of these boxes, especially those in which the goods are thick and the boxes deep, the label is entirely clear of the lid of the box and is also very much larger in height, therefore producing their design in a different proportion to where they use it on boxes that are shallow and where the lid comes down and hides the upper edge of this label.

(Complainant's counsel offers in evidence a box and contents and asks the Notary to mark the same "Complainant's Exhibit, Defendants' Box, No. 2.")

Q. 5. Will you please look at the object just offered in evidence and state what it is?

A. This is a box containing children's Irontex hosiery, labelled and put up in the manner in which R. H. Macy & Company are showing and selling these Irontex goods.

(Complainant's counsel spreads the following letter on the record, the same having been marked "Complainant's Exhibit, Keefe Correspondence.")

225

"July 19, 1910.

"Notaseme Hosiery Co.

"GENTLEMEN: Enclosed herewith are two pairs of stockings (socks) bought at Macy's today. In purchasing these I went in and asked the clerk for Notaseme socks. The formula used on both occasions was as follows:

"I said 'I want a pair of Notaseme half-hose.'

"The girl said

" 'What size'

"I answered

" '10½'

"She then asked

" 'What color'

"I said

" 'Black'

"In purchasing the second pair I was accompanied by a friend who paid particular attention to every word I said.

"I said 'I want a pair of Notaseme sox'

"She said

" 'What size'

"I said

" '10½'

"She asked

"Black"

"The only difference in the conversations was that the second girl suggested the color. I had Mr. Keefe go in with the box end and will write you this evening about it.

"Be careful to preserve these enclosures for the memoranda made on them were made at the time and are valuable because they may be used as exhibits.

"If I had more time I could prepare a more elaborate trap for them.

"Keep this letter as I may need it to refresh my memory should the case reach a trial.

"Yours truly,

"WM. KEEFE."

226 Q. 6. Will you please refer to the date of that letter, state what it is and whether or not "Complainant's Exhibit, Defendants' Box" was purchased before or after that date?

A. This is a letter received from Mr. Keefe dated July 19, which was of course three months after the purchase of the box that he made on April 12th, this box being "Complainant's Exhibit, Defendants' Box," and this letter which I now hold was to inform us and give us the details of the transaction of buying the hosiery that was contained in the envelope, "Complainant's Exhibit, Envelope Purchase."

Q. 7. Mr. Newman, you refer to date of April 12th. What year was this?

A. Nineteen hundred and ten.

(Complainant's counsel spreads the following letter on the record, the same having been marked "Complainant's Exhibit, Macy Letter No. 1.")

NEW YORK, Dec. 1st 1909.

"R. H. Macy & Co., Broadway at Sixth Ave., 34th St. to 35th St.:

"Established 1858.

"Paris, 3 Cite Paradis.

"Belfast, Floral Building, Cromac Square.

"Limoges, France.

"Rudolsrad, Thuringis.

"Carlsbad, Bohemia.

"Steinschonau, Bohemia.

"Chemnitz, Zwickauerstr 2.

"C. to S.

"GENTLEMEN: We are in receipt of your communication of Nov. 29th, in which you allege that the trade mark 'Irontex' which we are using on a brand of stockings, is an infringement on a trade mark which you have registered under the name of 'Notaseme.'

"We assure you that it is not our intention in any instance to infringe on anybody's rights and in this instance, we hardly think we have. The only similarity that would seem apparent, between

your label and ours, is that we use the same combination of colors i. e.—red and black. We hardly think that the rights which the registration of your trade mark accord you, are so broad as to prevent anyone from using a label in which a similar combination of colors are used.

"Inasmuch, however, as you feel that we are infringing on your rights, if you will advise us in just what particulars we are at fault, or send us copies of your papers, showing just how far your registration of your trade mark protects you, we will be pleased to go in the matter further and again communicate with you.

"Yours very truly,

"R. H. MACY & CO.,

"Per F. W. COWLISHAW.

"Notaseme Hosiery Co., Oxford and Mascher Streets, Philadelphia, Pa."

Q. 8. Will you please refer to this letter and state whether or not the comparison therein relative to the color of defendants' mark and complainant's mark is correct?

(Defendant's counsel objects to the question on the ground that the truth of the statements contained in this letter is entirely irrelevant, immaterial and incompetent and that the answer to this question must be, at best, a conclusion of the witness.)

A. They say in this letter the only similarity between heir label and ours is one of color. While it is true that this similarity
228 of color does exist, they make no mention of the similarity, in fact almost the sameness, of the design in which these colors are used.

Q. 9. Mr. Newman, how many accounts approximately have you in New York City?

A. In greater New York, we have about fifty accounts, approximately.

Q. 10. By whom are your goods sold in New York City?

A. They are sold by Mr. Keefe, our New York City salesman and also by our Mr. Milander, who solicits trade in New York City.

Direct examination closed.

Cross-examination by Mr. OWEN:

X Q. 11. This "Complainant's Exhibit, Show Card" which you testified was used by you during the first six months of your business when you were doing business as the Milander-Newman Company, is identical with the ones that were used then?

A. Yes, identical.

X Q. 12. And is this show card still used by you in this identical form?

A. No, we do not use these now. We have used them all up. We change them each time we order.

X Q. 13. This is one of the original which you have preserved since 1907?

A. Yes.

X Q. 14. You do not manufacture or use these at the present time then at all in this form?

A. No, not in that exact form. We had some slight changes made in them but practically the same sign has been used up until about a year ago. I think we used up the last of them.

X Q. 15. Referring to "Complainant's Exhibit, Defendants' Box No. 2," did you ever see that before this morning?

A. No.

X Q. 16. And as a matter of fact you do not know whether this is one of R. H. Macy & Co.'s boxes which was sold by them or not, do you?

A. I know it about as well as I know my own name.

X Q. 17. You did not buy it there?

A. No, I did not make the purchase.

X Q. 18. You did not see it purchased?

A. No, but everybody knows it and it would be very hard to prove that that is not one of their boxes. They have thousands of dozens of all goods on sale there.

(Defendants' counsel moves to strike out the answer on the ground that it is not responsive and on the further ground that it states a conclusion.)

X Q. 19. Then the only way that you know or pretend to know that this is one of defendants' boxes is because, as you say, everybody knows it?

A. No, I can prove that the purchase was made of this box in the store of R. H. Macy & Co.

X Q. 20. How would you prove that?

A. I have two proofs of it. I can produce if required, the person who bought this box of hosiery and this box of hosiery also contains a sales slip, or the package no doubt does, which will prove this purchase at R. H. Macy & Co.

(Witness refers to box and does not find the sales slip.)

Cross-examination closed.

Deposition closed.

A. W. NEWMAN.

Complainant's counsel gives notice that its prima facie case is closed.

230

Notice.

Circuit Court of the United States for the Southern District of
New York.

In Equity. No. —.

NOTASEME HOSIERY COMPANY, Complainant,

vs.

ISIDOR STRAUS and NATHAN STRAUS, Trading and Doing Business
under the Firm-name and Style of R. H. Macy & Co., Defendants

Please take notice, That we shall proceed to take proofs for final hearing on the part of the complainant under the 67th Rule of the Supreme Court for Courts in Equity, as amended, and in accordance with the statutes in such cases made and provided, and in pursuance of the rules and practice of this Court, before C. D. McVay, a Notary Public, under said statutes and rules at the office of Wiedersheim & Fairbanks at 1232 Chestnut St., on the 7th day of April, 1911, at 11.30 o'clock in the forenoon.

We desire the evidence to be adduced in this cause to be taken orally.

You are invited to attend and cross-examine the witnesses produced. The examination will be adjourned to such time and place as may be required, without further notice.

Dated, Philadelphia, Pa., April 4, 1911.

Very respectfully,

ROBERT M. BARR,
Counsel for Complainant.

231 To Messrs. Wise & Seligsberg, Counsel for Defendants:

The following are the names and residences of the witnesses to be examined under the foregoing notice:

— — —, residing at — — —.

— — —.

Due and timely service of the above notice is hereby admitted,
this 5th day of April, 1911.

WISE & SELIGSBURG,
Counsel for Defendants.

In the United States Circuit Court, Southern District of New York.

In Equity.

NOTASEME HOSIERY COMPANY, Complainant,

vs.

ISIDOR STRAUS and NATHAN STRAUS, Doing Business under the Firm-name and Style of R. H. Macy & Co., Defendants.

PHILADELPHIA, PA., April 7, 1911.

Met pursuant to agreement in the offices of Wiedersheim and Fairbanks, 1232 Chestnut Street, Philadelphia, Pa., before
232 C. D. McVay, an Examiner duly appointed by this court for the purpose of taking testimony in rebuttal on behalf of complainant in the above entitled cause.

Present: Robert M. Barr, Esq., for complainant; C. H. Owen, Esq., for defendants.

WILLIAM W. SMITH, a witness produced on behalf of complainant, being first duly sworn, testifies in answer to interrogatories propounded to him by Mr. Barr, as follows:

Q. 1. Please state your name, age, residence and occupation?

A. Wm. W. Smith, 4131 N. Broad Street, printer, forty years old.

Q. 2. How long have you been engaged in this business?

A. Twelve years.

Q. 3. What concern are you with?

A. The Estate of Thos. Johnson.

Q. 4. Mr. Smith, will you please explain briefly the steps necessary in the reproduction of a design in order to prepare the same for printing?

A. Of course the customer or manufacturer or jobber or whoever it may be, comes to us either with an oral or written description of such trade-mark or wording as he may want and it is necessary for us to have his ideas before we can formulate the design. We then turn this information over to our engraver who submits to us a pencil sketch embodying such ideas as we may be able to advance them, the sketch is returned to us and submitted to the prospective customer, so that he may approve of the same and return to us, suggesting such changes as he may want or adopting it as submitted. This allows us to proceed with the engraving and after completing the engraving we submit the customer printed proofs before supplying any to the trade. That is about as near as I can tell the method.

233 Q. 5. Who does this engraving for you?

A. Commercial Photo-Engraving Company, Tenth & Arch Streets, Philadelphia, Pa.

(Complainant's counsel offers in evidence a bill dated October

15, 1907, and asks the Examiner to mark the same "Complainant's Exhibit, No. 20.")

(Defendants' counsel objects to the introduction of this exhibit on the ground that it is incompetent, nor properly identified, not the best evidence and not proper rebuttal evidence.)

Q. 6. Will you please look at the object just offered in evidence and state whether or not you know what it is and if so state any facts in your knowledge regarding the same.

(Question is objected to on the ground that it is irrelevant, incompetent and immaterial, no basis having been laid for the question.)

A. It is simply a bill that comes to us in the regular course of commercial dealings with this firm, which is submitted as goods are delivered.

Q. 7. Are you familiar with the hand writing on the bill?

A. I am.

Q. 8. Will you please state whose hand writing this is?

A. It is the hand writing of a man named W. P. Chadwick who was with this firm at that time, and who in our particular case, always made his own charges and submitted his own bills, generally delivering them personally at the time he delivered the finished work. This man has since left their employ and I think is out of the State of Pennsylvania.

Q. 9. Will you please look at the second item on that bill and state whether or not you know to what it refers?

234 (Question is objected to on the ground that it is incompetent, irrelevant and immaterial and upon the further ground that this is not the proper way to prove any facts thereon.)

A. It is an item of a charge for some engravings and drawings prepared to serve the firm of Milander & Newman.

Q. 10. Are you able to identify the design which this printing refers to?

A. I am.

Q. 11. Will you please look at "Complainant's Exhibit, No. 1. Placard" and "Complainant's Exhibit, Complainant's Box" and state whether or not that is the design?

A. That is the design.

Q. 12. Will you please state the time that the representatives of the Notaseme Hosiery Company first came to your office?

(Question is objected to on the ground that it is immaterial and irrelevant, having no connection with the issues in this suit, it not having been shown that a representative of the firm of Milander & Newman made such visit and upon the further ground that it is not proper rebuttal testimony.)

A. As nearly as I can state, late in August or early in September, 1907. We kept no absolute record of the men's first call. The earliest thing we would have would be the bill for the engraving

or an order from the house for finished work, so that a statement on my part to this effect would simply be judging by the usual length of time taken to prepare and deliver designs and that is the only way I have to get at it. As a usual thing, it takes from four to six weeks.

Q. 13. Who were the representatives of this company who came to see you?

235 A. I do not know their initials but I know it was Mr. Milander and Mr. Newman.

(Defendants' counsel objects to this whole line of testimony upon the ground that it is immaterial, irrelevant and incompetent and on the further ground that it is not proper rebuttal testimony.)

(Complainant's counsel offers in evidence a bill dated April 29, 1908, and asks the Examiner to mark the same "Complainant's Exhibit, No. 21.")

(Objection to this exhibit is made upon the same grounds as stated upon the offering of the former exhibit.)

Q. 14. Will you please look at the object just offered in evidence and state whether or not you can identify the same?

A. I can.

Q. 15. What do the several items set forth there represent?

A. They represent charges for engraving cuts made and completed for Mr. George B. Pfingst. I might add that this order for these cuts was given to the Commercial Photo-Engraving Company direct by Mr. Pfingst, as we sent the engraving company's representative to him personally in an effort to serve him with entire satisfaction. The engraving when finished, was charged to us and by us to Mr. Pfingst. Mr. Pfingst remitted to us and we remitted to the Commercial Photo-Engraving Company.

Q. 16. Do you recognize the hand writing?

A. The hand writing is the same as on the previous exhibit, that of Mr. Chadwick's.

(Complainant's counsel now spreads on the record a copy of a letter and also introduces the same in evidence and asks the Examiner to mark the same "Complainant's Exhibit, No. 22.")

236

"Copy.

PHILA., 3-7-11.

"S. Wohfeld & Company, 538-540 North Third Street.

"GENTLEMEN: Please read carefully enclosed letter, give me dates of your first printing of Notaseme and Irontex labels, also a label of each.

"Yours truly,

(GEO. B. PFINGST.)"

(The introduction of this letter is objected to on the ground that it is a copy and not the best evidence and on the further ground that it is not proper rebuttal evidence and that it has no bearing upon the issues in this action.)

Q. 17. Mr. Smith, will you please look at the object just offered in evidence and state whether or not you are familiar with the contents thereof and if so, please state to what they refer.

(Objected to on the ground that the exhibit speaks for itself.)

A. It is a copy of a letter forwarded to our firm by Mr. Pfingst asking for information as to the earliest record we had of printing Notaseme and Irontex hosiery packing.

Q. 18. Whom was the letter referred to therein written by?

A. Attached to this was a letter from R. H. Macy & Company of New York City.

Q. 19. Please state whether or not you know what has become of the original of this exhibit?

A. The same was returned to Mr. Pfingst.

(Complainant's counsel offers in evidence copy of a letter dated March 4, 1911, and asks the Examiner to mark the same
237 "Complainant's Exhibit, No. 23," and also spreads the letter on the record.)

(Introduction of this letter is objected to on the same ground as stated upon the offer of the Exhibit No. 22.)

"(Copy.)"

"R. H. Macy & Co., Broadway at 6th Ave.

NEW YORK, March 4th, 1911.

"Mr. George Pfingst, c-o Owen Osborne, Sr., Cor. Fourth and Somerset Sts., Philadelphia, Pa.

"DEAR SIR: In connection with the action which the Notaseme Hosiery Company is bring- against us to enjoin us from using the label which we place on our 'Irontex' Hosiery, it is important for us to prove that the 'Irontex' label is not an imitation of the 'Notaseme' label and that it was designed by you and used by us prior to the time that the Notaseme Hosiery People designed and used their label.

"As you will remember, the 'Irontex' label was selected by us from a number of samples designed by you and submitted to us for our approval? Can you inform us as to the source from which you obtained your ideas in the designing of this label and whether at the time it was designed by you you had any knowledge of the existence and character of the 'Notaseme' label, and as to the earliest date upon which you had completed the label in the form that it was subsequently adopted by us.

"Any other assistance which you can give us which will be of assistance to us in establishing our contention as set forth above, will be greatly appreciated.

"The favor of a prompt response would greatly oblige,

"Yours very truly,

"R. H. MACY & CO.
"per T. WOWSHAW."

Q. 20. Will you please look at the object just offered in evidence and state whether or not that is the letter referred to in Exhibit No. 22?

A. This is a copy of the letter that came to us with Mr. Pfingst's favor of the third month, 7th and it was returned to him along with our reply.

(Complainant's counsel offers in evidence carbon copy of a letter dated March 13, 1911, to Mr. George B. Pfingst and asks the Examiner to mark the same "Complainant's Exhibit, No. 24," and also asks the Examiner to spread it on the record.)

(Introduction of this letter is objected to on the ground that it is not proper rebuttal evidence and that it is admittedly a copy of some letter and therefore not the best evidence, the absence of the original being unexplained, that its contents are immaterial and irrelevant and have no bearing upon the issues of this action and is in no way binding upon the defendants.)

Mch. 13-11.

Mr. George P. Pfingst, 538 N. 3rd St., Phila.

"MY DEAR GEORGE: In reply to yours of the 7th do not think we have been dilatory in extending you the information which you ask. In the first place we have been particularly busy and the Book-keeper has spent an afternoon checking up the dates you required.

"According to our records we have dug up bills from Commercial Photo-Engraving Co. showing delivery of the two cuts in question. The Notaseme Engravings are charged to us October 15, 1907.

"The Irontex Engravings are charged to us March 29th, 1908.

"According to our own individual books the initial deliveries of both these trademarks as far as we can learn from a close search was the 'Notaseme' November 7th 1907 and the 'Irontex' April 7th 1908. So that you see these dates agree with the length of time it takes us to make delivery of new printed matter after getting the cuts.

"While the writer has really no personal interest in this litigation I remember quite vividly that the 'Notaseme' was the first that we prepared, in fact we have often thought of the day that Messrs. Milander & Newman came in upon us at 5th & Huntingdon St. shop for the purpose of arranging special packing and I am almost certain that it was at least two months and upwards before we were favored with a *bonified* order. On a guess I should say somewhere in the month of August so that while our records do not show this they would really be entitled by our evidence to about two months and a half or more leeway in their claim than we could give them by specific figures.

"I have filed for future call the bills from the Engraver for these cuts feeling that some day we may *some day* be possibly drawn into it. From what I understand of the controversy it is not an action to recover damages but simply to prove priority of use of a design so why don't you adopt the initiative of informing Macy & Co. that you are sure of these conditions as I have explained them.

"Of course you are more personally interested in the matter than

we are, as we are only giving such information as we possess from a commercial standpoint. You could possibly settle the whole controversy if you would come out and give them a true statement of the facts as you evidently know they exist and save both firms further expense and possible unpleasantness for all concerned. However, that is simply offered as a suggestion and is up to you entirely, and I felt that in so suggesting you would not take offence.

"Yours very sincerely,

"EST. OF THOMAS JOHNSON."

240 Q. 21. Will you please look at the object just offered in evidence and state whether or not you can identify the same and if so please tell the Court what it is.

A. It is a copy of a letter from our firm to Mr. Pfingst dictated by the writer in answer to his interrogation of the 7th of March. (Witness refers to "Complainant's Exhibit, No. 22.")

Q. 22. This exhibit which I have just shown you is a carbon copy made in the regular course of business, is it not?

(This question is objected to as leading, on the ground that the witness is not shown to have any knowledge as to how the copy was made.)

A. It is.

Direct examination closed.

Cross-examination by Mr. OWEN:

X Q. 23. You say you are connected with the Estate of Thos. Johnson?

A. I am a son-in-law of Mrs. Johnson and another son-in-law and myself run the business for the estate.

X Q. 24. What is the business?

A. The special printing of various details for the hosiery and underwear trade.

X Q. 25. Your concern does the printing, but as I understand it, you do not manufacture the dies from which the printing is done?

A. No, sir, that is a separate and distinct branch.

X Q. 26. Now this visit of the representatives of the Notaseme Hosiery Company or of Milander & Newman concerning which you have testified, was that the first time that these people ever called at your office or place of business?

241 A. That was our initial acquaintanceship with either one of the two gentlemen. I remember it was a very warm day and that naturally would bear out my statement about the time being either August or September.

X Q. 27. They came in and saw you personally?

A. They came personally to us.

X Q. 28. They, I understand you to say, submitted you their design for this packing and you gave the order for the making of the dies to this Commercial Photo-Engraving Company?

A. That is correct.

X Q. 29. When did you ever see "Complainant's Exhibit, No. 20" before this morning?

A. Do you mean the last time I saw it?

X Q. 30. Yes.

A. The day previous to writing Mr. Pfingst in reference to the same.

X Q. 31. Where was it then?

A. It was in the cellar of our plant, filed away. That is we got it out in answer to the letter. I was very much surprised at finding it.

X Q. 32. You have not now any present recollection as to the date on which this was received?

A. Nothing beyond the date of the bill.

X Q. 33. If the date were not on there you would not have any idea as to when it was received?

A. Simply as far as my memory could carry me as to about the time. Naturally I could not carry dates for so long a time.

X Q. 34. When did you first see this?

A. To the best of my knowledge, the day of the date or the day after.

X Q. 35. On which it bears date?

A. Yes.

X Q. 36. You do not remember having seen it on that day, do you?

242 A. Only in the regular course of commercial transactions, I know the bill was delivered and paid regularly and our records show that our account was balanced for that month.

X Q. 37. Aside from what your records show and aside from what you know of the methods of your firm, you have no recollection that the bill ever passed through the firm or that you ever saw it?

A. Naturally I could not carry one item in my head for several years.

X Q. 38. Then if this bill had come from anywhere besides your files in the cellar you would not be able to tell us anything about what it is or what its items represent? You only identify it from the fact that it was found in your cellar and that you knew therefore it must have been the bill?

A. The only answer I could give to that, Mr. Owen, would be that our day book and ledger both show a charge for this printing shortly after the charge for the engraving against us by the engraving company. I looked over our books and found when I made initial delivery to the Notaseme Hosiery Company and by locating this date, was able to locate the bill for the preparation of the engravings.

X Q. 39. You did not make those entries in person?

A. No, sir.

X Q. 40. You did not see them when they were made or know whether they were correct?

A. To the best of my knowledge they would be correct as far as the conduction of a man's business would go.

X Q. 41. You do not know that they are correct?

A. I could not take an oath, no.

X Q. 42. Referring to Complainant's Exhibit No. 22, which purports to be a copy of letter dated March 7th, 1911, did you ever see the original of that letter?

A. Yes, sir.

X Q. 43. Was it referred to you for attention?

243 A. For reply. I open all mail.

X Q. 44. With that original you say came the original of Complainant's Exhibit, No. 23. Did you make this copy of the R. H. Macy Co. letter?

A. My stenographer made it for me.

X Q. 45. You do not know whether it is a correct copy, do you?

A. Only from re-reading it.

X Q. 46. As you re-read it, from your memory you believed it to be a correct copy?

A. Yes.

X Q. 47. It may not be an exact copy though, as far as you know? You cannot swear to it?

A. I could not swear to it, no.

X Q. 48. There might be a letter or something missing?

A. Yes.

X Q. 49. Referring to Complainant's Exhibit, No. 23, did you write that letter?

A. I dictated the letter.

X Q. 50. And this purports to be a copy of the original that you send to Mr. Pfingst?

A. That is a carbon copy.

X Q. 51. How do you know it is a carbon copy? Did you compare it with the original?

A. I carbon all my dictation, reserving such copies as I feel will be of value.

X Q. 52. You did not type this letter yourself?

A. It is only given me with the original. I did not write the letter personally but in the usual course of correspondence, both the original letter and carbon are laid on my desk to be O. K'd, or signed.

X Q. 53. There are some changes in lead pencil. Who made those changes?

A. The writer personally made the correction and addition.

244 X Q. 54. In those respects it is not a carbon copy of the original?

A. The same correction and addition was made on the original, which makes it a copy.

(Defendants move to strike out Complainant's Exhibits, Nos. 22, 23 and 24 on the ground that there is no proof that they are true and correct copies of the originals thereof, it appearing upon the contrary, that this witness cannot swear that they are such copies.)

Cross-examination closed.

Deposition closed.

WILLIAM W. SMITH.

GEORGE B. PFINGST, having been duly subpoenaed as a witness on behalf of complainant, having been duly sworn, deposes in answer to interrogatories by Mr. Barr as follows:

Q. 1. Please state your name, age, residence and occupation?

A. George B. Pfingst, Oak Lane, manufacturer, 38 years old.

Q. 2. How long have you been engaged in this present occupation, Mr. Pfingst?

A. About six months.

Q. 3. What was your previous occupation?

A. Hosiery manufacturer.

Q. 4. What was the name of the concern?

A. Lee Hosiery Mills.

Q. 5. While you were conducting the business of the Lee
245 Hosiery Mills will you please state whether or not you had any correspondence with Mr. Joseph F. Ackerman, formerly buyer at R. H. Macy & Co. and if so please state what it was?

(Question is objected to on the ground that it is immaterial, incompetent and irrelevant and on the further ground that if any correspondence were had the original letters are the best evidence. The testimony of this witness can only be secondary.)

A. Naturally I had quite a little correspondence with Mr. Ackerman but as that was three or four years ago I do not know the exact nature of the correspondence. There were many communications with Macy & Company.

Q. 6. Will you please state whether or not Mr. Ackerman wrote you in regard to getting up a design for Irontex hosiery?

(Question is objected to on the ground that if any such letter was written, the original letter is the best evidence of its contents.)

A. I cannot recall whether that was by communication or whether by personal interview.

Q. 7. Will you please state whether or not you were instructed, either verbally or by writing, to get up a design of some kind for use with Irontex hosiery?

A. Yes I was instructed to get up a design for Irontex hosiery.

Q. 8. Will you please look at Complainant's Exhibit, Defendants' Box, No. 2, and state whether or not the design shown thereon is the one which you submitted to Macy & Co.?

A. It is.

Q. 9. Where did you have these labels printed?
246

A. At the Estate of Thos. Johnson.

Q. 10. Can you state when the order was given by you to the Estate of Thos. Johnson for this printing, approximately?

(Question is objected to on the ground that it is not proper rebuttal evidence and on the ground that it is immaterial, irrelevant and incompetent.)

A. In March or April, 1908.

Q. 11. I now hand you Complainant's Exhibit, No. 22, and ask you to state whether or not you recognize the same and if so what it is?

A. It is a letter I wrote to the Estate of Thos. Johnson.

Q. 12. Do you know the present whereabouts of the original of that letter?

A. No.

Q. 13. Will you please look at the Complainant's Exhibit, No. 23, and state whether or not you recognize the contents thereof and if so please identify the same?

A. Yes.

Q. 14. What is it?

A. It is a letter I received from R. H. Macy & Co. in March.

Q. 15. Do you know where the original of that letter is at this time?

A. No.

Q. 16. When was it last in your possession?

A. In March, 1911.

Q. 17. If I understand it correctly, this letter was forwarded to the Estate of Thos. Johnson, together with the exhibit letter of March 7th. Will you please state whether or not that was ever returned to you?

(Objected to on the ground that the witness has not testified that he forwarded it to the Estate of Thos. Johnson.)

247 A. I do not think it was.

Q. 18. Do you know what has become of it?

A. No, sir.

Q. 19. I now show you Complainant's Exhibit, No. 24, and ask you to state whether or not you know what it is and if so, please identify it?

A. This is the answer of Johnson the printer to my letter of March 7th.

Q. 20. Have you the original letter in your possession at the present time?

A. I do not know.

(Complainant's counsel offers in evidence a carbon copy of a letter dated March 14, 1911, and asks the Examiner to spread the same on the record and mark it Complainant's Exhibit, No. 25.)

(Introduction of this paper is objected to upon the ground that it is admittedly only a copy of some paper and the absence of the original of which is unexplained and on the ground that the original only is the best evidence and on the ground that it is immaterial, irrelevant and incompetent and not proper rebuttal evidence.)

March 14, 1911.

"Mr. F. W. Cowlishaw, c-o R. H. Macy Company, New York, N. Y.

"DEAR SIR: The reply to your favor of recent date has been delayed owing to the fact that Mr. Johnson, the printer, has had to go over his old records in order to make positive the original dates of work turned out for the Notaseme Hosiery Company and the old Lee Hosiery Mills.

"I am enclosing you herewith a letter from Mr. Johnson which is

248 self-explanatory, and seems to indicate the priority of Notaseme Hosiery Company's use of the red and black label design.

"Trusting that this information will be of use to you, I remain,
"Yours very truly,"

Q. 21. Will you please look at that exhibit just offered and state whether or not you know what it is and if so please identify it?

A. It is a copy of a letter I wrote to Mr. Cowlshaw of R. H. Macy & Co. on March 14th in answer to his letter to me of March 4th, 1911.

Q. 22. Will you please state what letter is referred to therein as inclosed to Mr. Cowlshaw?

A. Letter of March 13th received by me from the Estate of Thos. Johnson.

Q. 23. Please state whether or not that carbon is made in the regular course of your business?

A. Yes.

Direct examination closed.

X Q. 24. Mr. Pfingst you have testified that these Complainant's Exhibit, No. 25 are copies of certain letters which you received or which you wrote. You do not mean to say that you are prepared to testify that these are exact correct copies of such letters, do you?

A. Yes.

X Q. 25. Can you say that this letter which exhibit purports to be a copy of letter written by R. H. Macy & Co. to you, is an exact copy of the letter which you received?

A. Yes.

X Q. 26. Have you compared this copy with the original?

A. No.

249 X Q. 27. Did you make the copy?

A. No.

X Q. 28. How can you say that it is an exact and correct copy thereof?

A. Because the meaning is identical with the meaning of the original.

X Q. 29. Then what you mean to say is that the substance of the communication in both is the same?

A. Yes.

X Q. 30. There may be perhaps a paragraph left out in this copy?

A. There might be a word or a letter eliminated but I hardly think it is likely inasmuch as it is a carbon copy. The meaning is identical with the meaning of the original.

X Q. 31. The only way which you are able to answer that these are copies is from your recollection as to the substance and your recollection that they contain the same subject matter?

A. That is the idea.

X Q. 32. How do you fix the date, Mr. Pfingst, on which you gave the Estate of Thos. Johnson the Irontex design to print?

A. Just by memory.

X Q. 33. You say it was sometime in March or April, 1908?

A. Yes, sir.

X Q. 34. Are you sure it was not in February, 1908?

A. No, I am not sure it was not in February.

X Q. 35. Might it not have been in January?

A. It was sometime after January 1st, 1908, to be more definite.

X Q. 36. You gave the design to the Estate of Thos. Johnson for the purpose of having them have a die made and do the printing?

A. Yes.

250 X Q. 37. This design which you submitted to the Estate of Thos. Johnson was one that you had previously submitted to R. H. Macy & Co. and had been approved by them, was it not?

A. Yes.

X Q. 38. Did you originate that design yourself?

A. No.

X Q. 39. Do you know who did?

A. I know the firm who did.

X Q. 40. Did they do it for you?

A. That I could not tell you.

X Q. 41. Well, you had the commission from R. H. Macy & Co. to originate the design for the Irontex hosiery, didn't you?

A. I had a commission from R. H. Macy & Co. to get up a label for hosiery. That didn't necessarily imply the origination of a design.

X Q. 42. And you asked some one else to help you in the designing of this figure?

A. Yes.

X Q. 43. Who was it?

A. It was a concern called the Commercial Photo-Engraving Company of Tenth and Arch Streets.

X Q. 44. Did they submit this design only or did they submit it together with some others?

A. I cannot remember at this time.

X Q. 45. Did they submit it to you as an original design which they had formulated themselves?

A. No.

X Q. 46. Did they make any representations to you at all as to from what source they derived their ideas?

A. No.

X Q. 47. You believed when this design was submitted to you that it was original with them, didn't you?

251 A. I did not know. I wanted something different from the ordinary cut. I told them to give me something a little different from the ordinary cut and dried hosiery label, which they did in the shape of this design.

X Q. 48. And when it was submitted to you, you believed that it was different from any other label you knew of?

A. It was different from any other label I had ever seen.

(Defendants offer an advertisement appearing on page 45 of the

Saturday Evening Post of April 1st, 1911. It is consented that the page, only, be offered in evidence.)

(Complainant's counsel objects to the offer of this exhibit as immaterial and irrelevant and furthermore incompetent having no bearing on the rebuttal testimony and upon the further ground that defendants have closed their proofs and the offer of this exhibit at this time is not understood and the Court will be asked to strike the same from the record.)

Cross-examination closed.

Deposition closed.

GEORGE B. PFINGST.

252 In the United States Circuit Court Southern District of New York.

In Equity.

NOTASEME HOSIERY COMPANY, Complainant,

vs.

ISIDOR STRAUS and NATHAN STRAUS, Trading and Doing Business under the Firm-name and Style of R. H. Macy & Co., Defendants.

Stipulation.

It is hereby stipulated by and between counsel for the respective parties:

That at the session held in Philadelphia, on April 7th, 1911, complainant's counsel was unable to produce the witness Chadwick, the maker of complainant's exhibits Nos. 20 and 21, for the reason that his whereabouts are unknown, and could not be ascertained, notwithstanding that complainant and its counsel made diligent and extensive search therefor.

That defendant's counsel requested he be relieved of another trip to Philadelphia for purposes of cross-examination by
253 forwarding the direct deposition of any witness to New York to defendant's counsel with privilege of returning written cross interrogatories.

That therefore in order to avoid the necessity of recalling rebuttal witness, Arthur W. Newman, a stipulated statement of facts was formulated.

Wherefore, it is hereby stipulated and agreed by and between counsel for the respective parties:

First. That the said Arthur W. Newman, if duly called cautioned and sworn as a witness in this cause would testify as follows:

My name is Arthur W. Newman and I am the same Arthur W. Newman who has heretofore testified in this cause. I have since the discovery of the bills marked "Complainant's Exhibits No. 20 and No. 21" visited the Commercial & Photo Engraving Company at their place of business, Tenth and Arch Streets, Philadelphia, in

an endeavor to locate the party who made out these bills and whose handwriting appears thereon. I saw the bills were signed "Chad" and was told by the representative of the Commercial & Photo Engraving Co., that a bookkeeper employed by them in 1907 was named "Chadwick" and that the bills were in his handwriting, but that he had left town some two years back and his present whereabouts were not known.

I then asked for records of my original order for the engraving of my trade-mark design, but found, owing to the fact that the said engraving company was in its infancy at that time and without any established system for preserving orders and records of such transactions, that I could not obtain any of the desired evidence and I am therefore unable to produce any of the original sketches of 1907 from which the engravings for the trade-mark design here in suit were made notwithstanding I have made diligent endeavors to locate the same.

254 I have made every effort to locate Mr. Chadwick, but can find no one who is acquainted with his present address or knows where he is at the present time.

I have read the testimony of Mr. William W. Smith and corroborate his statements in so far as they concern the subject matter and times of interviews with me and the subject-matter of bill marked "Complainant's Exhibit No. 21."

Second. That the above stipulated statement shall stand in the place of a rebuttal deposition by said Newman and that all of the statements and allegations of fact contained therein shall be used for all purposes in the progress of this cause and at the hearing in like manner, as and with the same force and effect, as if they were statements and allegations made by said Arthur W. Newman in the course of a regular deposition, duly and legally made, taken down, signed and certified in accordance with all the essential requirements of the Statutes and of the Rules of the court in such case made and provided.

Third. That the defendants reserve the right to object to the introduction of the foregonig testimony, and that they hereby object to the same upon the ground of its incompetency, irrelevancy and immateriality.

Dated New York, May 4, 1911.

ROBERT M. BARR,

Counsel for Complainant.

WISE & SELIGSBERG,

Counsel for Defendants.

255 In the United States Circuit Court for the Southern District of New York.

NOTASEME HOSIERY COMPANY, a Corporation Organized and Created under the Firm-name and Style of R. H. Macy & Company, Complainant,

against

ISIDOR STRAUS and NATHAN STRAUS, Trading and Doing Business under the Firm Name and Style of R. H. Macy & Company, Defendants.

The Joint and Several Answer of Isidor Straus and Nathan Straus, the Defendants, to the Bill of Complaint of the Notaseme Hosiery Company, Complainant.

These defendants now, and at all times hereafter, saving and reserving to themselves, and each of them, all benefit and advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties, omissions and other imperfections in the said bill contained, for answer thereto, or so much thereof as these defendants are advised is or are material, or necessary for them, or either of them, to make answer unto, they, these defendants, answering, say:

(1) These defendants have not, nor has either of them, any knowledge or information other than from complainant's bill, sufficient to form a belief that the Notaseme Hosiery Company is a corporation, or that such corporation is duly organized under and by virtue of the laws of the State of Pennsylvania, or that it has its principal place of business in Philadelphia, in the State of Pennsylvania; but these defendants being wholly ignorant of each and every of such matters and things, call upon and require said complainant to make strict proof of the same.

(2) The defendants have not, nor has either of them, any knowledge or information, other than from complainant's bill, sufficient to form a belief as to each and every allegation contained in paragraph I of the complainant's bill; but these defendants being wholly ignorant of each and every of such matters and things, call upon and require said complainant to make strict proof of the same.

(3) The defendants have not, nor has either of them, any knowledge or information other than from complainant's bill sufficient to form a belief as to whether, as alleged in paragraph II of complainant's bill, since May 10, 1909, complainant has been located and has maintained a regular and established place of business at Philadelphia, Pennsylvania, or whether complainant has been continuously engaged in the manufacture and sale of hosiery, but these defendants, being wholly ignorant of each and every of such matters and things, call upon and require said complainant to make strict proof of the same. And further answering, defendants deny on information and belief that, as alleged in

said paragraph II, said hosiery has come to be known by an arbitrary sign fixed thereto in the form of a definitely colored fanciful polygonal design, or that by the investment of a large amount of capital in the business of making and selling said hosiery and in advertising the same complainant has established a valuable reputation for the same, or that the demand for said hosiery has speedily increased until its sales now amount to about \$300,000 annually.

(4) The defendants, and each of them, deny upon information and belief the averments of paragraphs III, IV and V of the complainant's bill, and each and all thereof.

(5) Defendants admit that a certificate of registration was issued May 4, 1909, No. 73597, to The Milander-Newman Company for a pretended trade-mark, but deny that as alleged in paragraph IV of complainant's bill in the application filed therefor December 14, 1907, the essential feature consisted of an arbitrary polygonal figure having a diagonal band forming upper and lower panels in red, and they deny that said alleged trade-mark was legally registered. Further answering, defendants aver that said pretended trade-mark was not a valid trade-mark, and the polygonal figure having a diagonal band forming upper and lower panels in red was not appropriate as a trade-mark in which any exclusive right can exist as against others.

Further answering, defendants allege that The Milander-Newman Company, the alleged predecessor of complainant, filed an application December 14, 1907, in the Patent Office of the United

258 States for the registration of a trade-mark consisting of the figure of a square with the word "Notaseme" included in a panel diagonally crossing said figure and extending from the upper left hand corner to the lower right hand corner thereof; that on January 2, 1908, the Examiner of Trade-Marks and Designs rejected said application on the ground that the word "Notaseme" was the distinguishing feature of the applicant's mark, and merely a descriptive term indicating that the hosiery is made without seam; that the drawing in said application was cancelled December 19, 1908, and a substitute drawing filed December 19, 1908, and said application amended by withdrawing the word "Notaseme"; but notwithstanding such cancellation and withdrawal complainant has continued to use the word "Notaseme" and to designate and mark the word itself "Trade-mark," to the deception of the public.

(6) The defendants have not, nor has either of them, any knowledge or information other than complainant's bill sufficient to form a belief as to each and every allegation contained in paragraph VII of complainant's bill, but these defendants, being wholly ignorant of each and every of such matters and things, call upon and require the said complainant to make strict proof of the same.

(7) The defendants have not, nor has either of them, any knowledge or information sufficient to form a belief, save by complainant's said bill, as to whether, as alleged in paragraph VIII of complainant's bill, said polygonal figure having the word "Notaseme" thereon was first used by the predecessor of complainant on or about Septem-

ber 1, 1907, or whether it has since been continuously used
 259 by complainant, or whether it has been used in commerce
 between different States, or that complainant has expended
 \$5,000 in street car advertising in New York, or that the sales of said
 hosiery amount to \$300,000 worth yearly; but these defendants,
 being wholly ignorant of each and every of such matters and things,
 call upon and require the said complainant to make strict proof of
 the same; and further answering, deny upon information and belief,
 that the fanciful polygonal figure having the word "Notaseme"
 thereon is now the exclusive right of the complainant, and that the
 mark referred to in said paragraph VIII is a valid trade-mark, or
 that the hosiery to which said mark is alleged to have been applied
 by complainant is of a superior quality to other makes sold at same
 price, or that the said alleged trade-mark is of the value of \$15,000,
 or of any value whatever.

(8) These defendants deny, and each of them denies, upon in-
 formation and belief, the averments of paragraphs IX, X, XI, XII
 and XIII of the bill, and each and all of them; and the defendants
 specifically deny that they, or either of them, or their agents or em-
 ployees, with fraudulent and wrongful intent to injure complainant
 and to deprive it of its just gains, or to deceive or to confuse the
 public and buyers of said hosiery, or at any time or for any purpose
 whatever, have placed or sold within the Southern District of New
 York, or elsewhere, or are now selling in the City of New York, or in
 the Southern District of New York, hosiery put up in boxes dressed
 and labeled substantially or approximately the same as complain-
 ant's cartons and boxes, or in likeness thereto, or at any time have
 sold hosiery in imitation of the hosiery sold by the complainant.
 And defendants further deny that their label with a black diagonal

260 bar and upper and lower panels in red with the word "Iron-
 tex" on it is in any way an imitation of complainant's label,
 or alleged trade-mark, or that the same is not likely to be
 disguised by the casual purchaser, or by an ordinary person, or that
 defendants, or their agents or employees, are enabled to confuse and
 deceive purchasers and mislead them, or that complainant has been
 or could be deprived of any sums of money whatever by the sale of
 hosiery under the label "Irontex," or any label, mark or name used
 by defendants, their agents or employees, or that defendants' sales
 constitute a competition in business and trade which is inequitable
 or unlawful or that they, or either of them, or their agents or em-
 ployees, have taken any action which constitutes illegal, unjust or
 inequitable conduct and which courts of equity have classed as "Un-
 fair Competition in Trade," or in any way have injured or wronged
 complainant.

(9) These defendants admit that they are both of the City of
 New York, State of New York, and maintain a regular and estab-
 lished place of business at No. 1317 Broadway, in New York City,
 Southern District of New York, and that they trade and do business
 under the firm name and style of R. H. Macy & Co., and that the
 said R. H. Macy & Co. is not incorporated, and that the said R. H.
 Macy & Co. has a regular and established place of business at No.

1317 Broadway, but they deny, and each of them deny, any knowledge or information sufficient to form a belief as to the allegations that complainant and defendants are of divers citizenship.

(10) These defendants have not, nor has either of them any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph XV of the bill; but these defendants being wholly ignorant of each and every of such matters and things call upon and require said complainant to make strict proof of the same.

261 (11) These defendants, and each of them, deny, upon information and belief, the averments of paragraph XVI of the bill, and each and all thereof.

(12) These defendants aver, upon information and belief, that the hosiery sold by them under the name "Irontex" is finer and better than complainant's and that defendants' business is larger and more important, and its goods more favorably known.

(13) Defendants deny that complainant is entitled to recover in this or any other suit by reason of the accounts or premises herein, and in the bill of complaint recited, in the amount of Two thousand dollars, or any other amount whatsoever.

(14) And further answering, these defendants aver, on information and belief, that the figure shown in the drawing, Exhibit 1, attached to complainant's bill, the upper and lower panels being printed in red, has been in common use in connection with and upon boxes and cartons containing hosiery and similar goods long prior to its alleged use by complainant.

(15) And for further answer in this behalf these defendants aver, upon information and belief, that the polygonal figure with the lower panels in red and intermediate diagonal bar in black do not indicate origin, and never have, without the word "Notaseme;" that the word "Notaseme" is the predominant feature of the label, and the polygonal figure merely serves as a frame to give prominence to the enclosed word, and that defendants' trade-mark, name and label in no way infringes, and is highly distinguishable from all the labels and marks used by complainant.

262 (16) Further answering, these defendants allege, on information and belief, that the complainant, for a long time prior to the filing of said bill, to wit, two years, had knowledge of the fact that these defendants were doing business as aforesaid, and selling hosiery under the name "Irontex" upon label now used, and that said complainant was guilty of laches in not filing its said bill long prior to the time when said bill was in fact filed; and that said defendants ever since March 2, 1908, have advertised and sold the said hosiery, and expended large sums of money in advertising said hosiery, and that said hosiery has become well and favorably known under and by said name of "Irontex"; and these defendants further answering state that the said trade name "Irontex" has become of great value to these defendants, and the suspension of the use thereof would occasion to these defendants great loss of damage.

(17) These defendants, further answering, aver that the polygo-

nal figure composed of upper and lower panels and an intermediate diagonal border with various letterings and various colorings has been used to mark similar articles, and cannot be exclusively appropriated by the complainant.

(18) Further answering, defendants allege that on April 16, 1908, they filed an application for a trade-mark for hosiery consisting of the word "Irontex," which trade-mark had been used in their business since March 2, 1908, and on August 11, 1908, said trade-mark was duly registered. That said trade-mark has always been printed diagonally, running from the lower left hand corner to the upper right hand corner, upon a red, black and gilt oblong, rectangular figure, and in the angles of said figures, which are in red, appear the words, in large black letters, "The Hose
263 That," and the words "Wears Like Iron." The goods of the defendants have been known and sold to the public by and under the name of "Irontex" since March 2, 1908, while the complainant's goods, as the defendants allege on information and belief, have always been known and sold to the public under the name "Notaseme."

Without this, that any other matter, cause or thing in said bill of complaint contained, and not herein and hereby well and sufficiently answered unto, traversed and denied, confessed or avoided, is true; all of which matters and things these defendants are ready to aver, maintain and prove as this Honorable Court shall direct, and beg to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

WISE & SELIGSBERG,

Solicitors for Defendants I. Straus, Nathan Straus.

ROBERT G. MONROE,

EDWARD E. WISE,

Of Counsel.

November 17th, 1910.

Endorsed: United States Circuit Court, Southern District of New York. Notaseme Hosiery Company, &c., complainant, against Isidor Straus and Nathan Straus, trading and doing business under the firm name and style of R. H. Macy & Company, defendants. Answer. Wise & Seligsberg, Solicitors for defendants, office & P. O. address 15 William Street, Borough of Manhattan, City of New York. U. S. Circuit Court, Southern District N. Y. Filed Nov. 18, 1910. John A. Shields, Clerk.

264 In the United States Circuit Court, Southern District of New York.

NOTASEME HOSIERY COMPANY, Complainant,
against

ISIDOR STRAUS & NATHAN STRAUS, Trading and Doing Business
under the Firm Name and Style of R. H. Macy & Company,
Defendants.

Evidence Taken on Behalf of the Defendants in the Above-entitled Cause before Hon. John A. Shields, Standing Examiner of the Circuit Court of the United States, in and for the Southern District of New York, under and Pursuant to the Sixty-seventh Rule of the Supreme Court of the United States in Equity, as Amended, at the Offices of Messrs. Wise & Seligsberg, 15 William Street, in the Borough of Manhattan, City of New York, by Agreement of Counsel for the Parties Herein.

THURSDAY, March 9th, 1911—at 11 a. m.

Present:

Robert M. Barr, Esq., Counsel for Complainant.
Edmond E. Wise, Esq., Counsel for Defendants.

265 JOSEPH F. ACKERMAN, called on behalf of the defendants, testified as follows:

Direct examination by Mr. WISE:

Q. 1. What is your full name?

A. My full name is Joseph F. Ackerman.

Q. 2. Your age?

A. 37.

Q. 3. What is your present occupation?

A. Manager of the corset business of the Birdsey-Somers Company of Bridgeport, Conn.

Q. 4. How long were you there?

A. A year and ten months.

Q. 5. What was your occupation before that time?

A. Buyer of hosiery and underwear for R. H. Macy & Company.

Q. 6. How long were you in their employ?

A. About nine years with Macy's, and about one year with Abraham & Straus, about ten years in all.

Q. 7. Can you fix the dates of your employment at Macy's?

A. As near as I can recollect, I went with Macy's about 1899, I guess, or 1900.

Q. 8. When did you leave Macy's?

A. I left there the last Saturday in April, 1909.

Q. 9. During that time, what were your duties at Macy's?

A. My duties were to buy hosiery, underwear for men, women and children; keep myself generally posted as to what was on the market in these lines and to manage the department.

Q. 10. Management of the department included the sale of goods at retail?

A. Exactly.

Q. 11. You bought all the goods for that department?

COMPLAINANT'S COUNSEL: Objected to as leading.

A. I bought everything that was kept for this department.

266 Q. 12. Men's women's and children's hosiery were included therein?

COMPLAINANT'S COUNSEL: Same objection.

A. Men's, women's and children's hosiery were included in my department.

Q. 13. Now, will you just describe in a general way what familiarity you had with hosiery and how you obtained your familiarity with hosiery during your experience as buyer for R. H. Macy & Co.?

A. In the first place, I studied the markets very carefully by going to the different places of business, such as importers, agents or mills, both here and in Europe. Another way, I found out what was on the market was through an organization that Macy's had; by the way of shoppers who would purchase hosiery from other stores, both large and small, and send them to me to see if we had anything similar to them in the department. Another thing, if a customer at any time should call at the department for any particular item which we did not have in stock, a record of this was made on what is called a "call slip." These were afterwards classified and put on cards. These cards would be sent to the buyers.

Q. 14. When you say buyers, what do you mean?

A. I mean me in this instance.

For me to state the reason why we did not carry this particular line of merchandise or if we did carry it why we were out of it at this particular date.

Q. 15. That call system was in force throughout the period that you were there?

A. It was.

Q. 16. Now, just explain a little bit more in detail, that is, who made the call, to whom the slips were sent?

A. The clerk at the department (salesgirls) had what is commonly call-d a call slip in her check book; throughout the 267 day, any customer calling for anything, no matter what it was and which we did not have in stock, it was the girl's duty to enter this inquiry on the so-called "call slip." These call slips were collected every night by the floorwalker, who in turn sent them to the office. The office would then enter these and place my name on the cards.

Q. 17. That is, if the call came from your department?

A. Exactly, from my department alone.

And on the back of these cards I would state the reason why we did not carry it or if we did carry it why we did not have it and when we expected an additional supply. These call slips were then

sent to a member of the firm and if my answer was not satisfactory, he would send for me and we would go into the matter in detail.

Mr. WISE: I hand you a plain slip with printing at the top, which is called "Out and Call Slip," and ask you what that is?

A. That is what I have just described as a call slip and what the salesgirls keep in their book to enter any particular call that they have during the day.

Mr. WISE: I offer that in evidence, not the memorandum on it, but simply the blank and the printed form.

Slip received in evidence and marked Defendant's Exhibit, Call Slip, Exhibit A, March 9th.

Q. 18. In your experience as buyer did you become familiar with all the different grades and kinds of hosiery that were in the market?

Question objected to as immaterial and irrelevant.

Q. 19. Are you familiar with the Irontex hosiery that was sold at R. H. Macy & Company.

A. I am.

268 Q. 20. Will you kindly describe when Irontex hosiery was first put on the market at R. H. Macy & Company's; how the name and the dressing of the goods was obtained by them? How the name and dressing of the goods, that is, boxes and labels etc.?

A. Do I understand that you wish me to give you a description from the date that we first thought of Irontex.

Q. 20½. Yes, I want a description of the goods, in the first place, the date when the name was adopted, and as nearly as you can remember, the date when the goods were first put upon the market and a description of the boxes and labels in which they were packed?

A. The description of the Irontex hosiery, the men's and the women's are what are known as "full fashioned" hosiery; the children's have full fashioned feet and circular legs.

Q. 21. What do you mean by "full fashioned hosiery"?

A. By "full fashioned hosiery" I mean—

Q. 22. Will it aid you to illustrate?

A. It would.

Q. 23. Well, take Plaintiff's Exhibit, Defendants' Box, that is a box of hosiery which is stamped "Macy" and has Irontex on it and purports to have been bought at R. H. Macy & Company's; can you identify the goods as having been so bought?

A. Yes.

Q. 24. Now, just describe, taking the sock, exactly what you mean by "full fashioned" hosiery?

COMPLAINANT'S COUNSEL: I object to that question as having nothing to do, as far as counsel for complainant can see, with the present issue and is immaterial and irrelevant.

Mr. WISE: This evidence is offered for the purpose of showing the radical difference between the wares of R. H. Macy & Company, known as Irontex, and that of the complainant, known as Notaseme.

269 A. By full fashioned hosiery I mean that the stocking is knitted on what is called "full fashioned frames"; at a point of the sole, near the heel, there is a series of what are called "narrowings." These narrowings are placed here so that the sock will be perfect fitting and retain its shape after it is worn and washed.

Q. 25. How far up does that extend?

A. From the sole of the sock.

COMPLAINANT'S COUNSEL: Same objection.

Q. 26: Approximately, I mean inches?

A. You mean from the bottom of the sole to the narrowings?

Q. 26½. Yes.

A. Well, I should judge about half an inch from the lower seam and about the same distance from where the heel is joined to the sole.

Q. 27. Are there many seams in that sock?

A. There is a seam which extends from the point of the toe, under the sole, around the heel, up the back of the sock to the body, or what is called the ribbed body.

Q. 28. Are there any other seams?

A. There is also a seam from the bottom of the sole near the heel.

Q. 29. Extending upwards how far?

A. Extending upwards about two inches, an inch and three-quarters to two inches.

Q. 30. Are these seams easily distinguishable on examination?

A. They are.

Q. 31. Are they similar, these socks, to the socks contained in Complainant's Exhibit, Complainant's Box, which I herewith show to you?

COMPLAINANT'S COUNSEL: Objected to as leading.

A. I would say they are not similar.

Q. 32. What difference, if any, is there?

270 COMPLAINANT'S COUNSEL: Objected to as immaterial and irrelevant.

A. Between these two exhibits, the Irontex, which you show me is an imported stocking, made in Germany, and is "full fashioned." This exhibit marked 401, I am informed, is what is known in the hosiery trade as the seamless sock.

Q. 33. Just describe in a general way what is known in the trade as a seamless sock?

COMPLAINANT'S COUNSEL: Same objection.

A. A seamless stocking in the trade usually designates a stocking made on what is called a cylinder machine. To a great extent, a stocking is pressed into shape instead of knitted. This does not mean the part which has no stamping under the sole or back part of the leg.

Q. 34. Are these two different types of socks well known in the trade?